TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 97

ANSEL HIGGINS, PETITIONER,

vs.

CARR BROTHERS COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

PETITION FOR CERTIORARI FILED MAY 20, 1942.

CERTIORARI GRANTED JUNE 8, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN SUPERIOR COURT OF CUMBERLAND COUNTY

STATE OF MAINE. APRIL TERM, A. D. 1941

No. 8194

ANSEL HIGGINS

v.

CARR BROTHERS COMPANY

OPINION—May 5, 1941

The plaintiff sues to recover unpaid wages and overtime compensation alleged to be due him by reason of the provisions of the Fair Labor Standard- Act of 1988, 52 S. D. A. T. 1060.

On October 24, 1938 when the said Act went into effect the Plaintiff was an employee of the Defendant and this relationship continued until July 24, 1940.

The Defendant is engaged in the sale and distribution to the retail trade of fruits, vegetables and groceries. It obtains its merchandise partly from local sources and partly from without the state. It buys for resale and general distribution. The merchandise is brought to the store of the defendant and from there sold and distributed to retail dealers. Some of the merchandise is processed for the retail trade, the remainder is sold in the same condition in which it is received in the store.

The Plaintiff testified that from October 24th, 1938 the date on which the Act became effective, to April 1, 1939, he was "night watchman and shipper". He described his duties as follows, "Well I had all the orders to put up and I had to take care of all the customers that came in, put [fol. 2] up the freight and then get it ready to ship". From April 1, 1939 until he left the employ of the defendant, he testified he drove a delivery truck.

On October 24th, 1938 and for a period thereafter, the defendant was selling and delivering a part of its merchandise to customers in New Hampshire. The witnesses for the plaintiff and defendant differ as to the length of this period. The driver of the truck, making the New Hampshire deliveries testified that he made such deliveries until about the First of January 1939. I find as a fact that

such deliveries were made for a period of ten weeks from October 24, 1938.

During such time I find that the defendant was engaged in the sale and distribution of merchandise in such manner and that it was engaged in Inter State commerce and the plaintiff was an employee of the defendant, doing work that was a part of such sales and distribution and that the provisions of the Act apply to the relations of the plaintiff and defendant as employer and employee during such period.

The plaintiff testified during this period he was working from 8 a. m. to 8 p. m. with one hour out for lunch and I find that such was the fact. I find that during this period his unpaid minimum wage and overtime compensation amounts to $31.70. He is entitled under the provisions of the Act to an equal sum as liquidated damages, a total of $63.40.

Do the provisions of the Act apply to the employment of the defendant subsequent to the time when sales and deliveries in New Hampshire were discontinued? In Schechter vs. United States, 295 U. S. 495, the defendants were indicted for violation of a code established under the pro- [fol. 3] visions of the National Recovery Act. The code in question applied to the sale and distribution of poultry. In passing upon whether such sale and distribution was part of Inter State Commerce, Chief Justice Hughes in his opinion first described the business carried on by the defendants as follows: "Defendants ordinarily purchase their live poultry from commission men at the West Washington market in New York City or at the railroad terminals serving the city. But occasionally they purchase from commission men in Philadelphia. They buy the poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets in Brooklyn, it is there sold usually within twenty-four hours to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendant is immediately slaughtered prior to delivery by schochtim in defendants' employ". He then said, "Were these transactions 'in' interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other states. But the code provisions, as here applied, do not concern the transportation of the poultry from other States to New York, or the transactions of the commission men or others to

whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at West Washington Market in New York City or at the railroads' terminals serving the city, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers, [fol. 4] who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce.——

"The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry herein questioned is concerned, the flow in interstate commerce has ceased. The poultry had come to a permanent rest within the State. It was not held, used or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States.

Hence decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here."——

The Schecter case and the present case arise under different Statutes. It is necessary however to determine in each case whether the method of doing business constitutes Inter State Commerce. In the Schecter case the Court of last resort interpreted a method of doing business definitely [fol. 5] outlined by the Court as not constituting Inter State Commerce. The Court did not qualify its decision on this point as applying solely or particularly to matters arising under the Statute then under consideration. By its language it indicated that its decision was founded

upon a general principle applicable to any case arising, in which it is necessary to determine whether a method of doing business constitutes Inter State Commerce. The method of doing business in that case and the present case are essentially the same. The commodities dealt in by the respective defendants in the two cases are different, but in each case the commodities were obtained partly from local sources and partly from sources without the state. The commodities were deposited in the principal place of business of the respective defendants and from there sold and delivered. I find that the plaintiff was employed in the sale and delivery of the defendant's merchandise from its store and that the business did not constitute Inter State Commerce.

As to the plaintiff's contention that the provisions of the Act apply because the defendant competes with other dealers who are engaged in interstate commerce, I believe that that part of the opinion applied in which the Chief Justice said, "—But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic [fol. 6] concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control".

He further said "The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce".

I find that provisions of the Act do not apply after the ten week period in which deliveries were made in New Hampshire. I find judgment should be for the plaintiff in the sum of $63.40 as his unpaid wage and overtime compen-

sation and liquidated damages and in addition thereto an Attorney's fee of $100.00 making a total of $163.40.

May 5, 1941.

Arthur Chapman, Justice Superior Court.

[fol. 7] In Supreme Judicial Court of Maine

Ansel Higgins

v.

Carr Brothers Company

Opinion—February 25, 1942

Sturgis, C. J.:

In this proceeding the plaintiff, Ansel Higgins, sues his employer, Carr Brothers Company for unpaid wages and overtime compensation alleged to be due him with liquidated damages for the period from October 24, 1938, to July 24, 1940, under the Fair Labor Standards Act of 1938, 52 Stat. 1060, U. S. C. A. Tit. 29, c. 8, #201, et seq. The plea was the general issue with a brief statement denying that the employer and employee were engaged in interstate commerce at the time embraced in the declaration and that the Fair Labor Standards Act had been violated. By consent of the parties the case was heard by the court with jury waived and with the right to except as to matters of law reserved. The plaintiff presents his exceptions to the decision filed.

The Fair Labor Standards Act of 1938, approved June 25, 1938, with exceptions not here of concern, fixes the minimum hourly wage and the maximum hours of the workweek of all employees who are engaged in commerce or in the production of goods for commerce. As defined "commerce" means interstate commerce. Section 3(b).

The Act provides in Section 6(a), effective October 24, 1938, that such employees shall be paid,

"(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour * * *."

And in Section 7(a), also effective on October 24, 1938, that no employer shall employ any such employee,

"(1) for a workweek longer than forty four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

"Unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Under Section 16(b) any employer who violates Sections 6 or 7 of the Act is "liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." In addition to any judgment awarded, the plaintiff or plaintiffs are entitled to the allowance of a reasonable attorney's fee and costs of the action.

(1) Carr Brothers Company is a local corporation conducting a wholesale fruit, grocery and produce business in Portland. It buys its merchandise from local producers and from dealers in other states, has it delivered by truck and rail, unloaded into its store and warehouse and from there sells and distributes it to the retail trade. While some of [fol. 8] the produce and fruit is processed, much of it is sold in the condition in which it is received. The corporation owns all of its merchandise and makes its own deliveries. It makes no sales on commission nor on order with shipments direct from the dealer or producer to the retail purchaser. When the wage and hour provision of the Fair Labor Standards Act went into effect the corporation was selling and delivering its merchandise not only to the local trade in Maine but also to retailers in various cities and towns in New Hampshire and the record indicates that a somewhat substantial part of what it bought in other states was intentionally destined for final transportation into New Hampshire after a temporary deposit or rest in its store or warehouse in Portland. At the end of ten weeks, however, this out of state trade was discontinued and thereafter all sales and deliveries were solely to retailers in Maine.

The plaintiff, Ansel Higgins, was at first employed by Carr Brothers Company as night shipper, serving customers, putting up all orders and loading trucks including those used for out of state deliveries. He worked sixty-six hours a week for a wage of $16 in this service for the ten weeks in which trade in New Hampshire continued. The court below found and ruled that for this period the employee was entitled to the benefits of Sections 6(a), 7(a) and 16(b) of the Act and the defendant employer was liable to him for unpaid minimum wages and overtime compensation computed to be $31.70, together with liquidated damages of equal amount, a $100 counsel fee and altogether $163.40. Standing alone this decision is not attacked mathematically or otherwise. It seems to have been fully warranted. The merchandise which Carr Brothers Company purchased in other states intended to be shipped into Maine, here rest temporarily only, and later go forward in transportation to New Hampshire remained in the "current" of interstate commerce, until it reached its ultimate destination. The continuity of the movement of the goods was never broken in Maine and did not then cease. Swift & Co. v. United States, 196 U. S. 375, 25 S. Ct. 276; Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397; Board of Trade of City of Chicago v. Olsen, 262 U. S. 1, 35, 43 S. Ct. 470; Binderup v. Pathé Exchange, 263 U. S. 291, 44 S. Ct. 96. It is clear on the record, we think, that the plaintiff employee, for the period that he was actively and regularly employed in putting up orders and loading trucks with merchandise for New Hampshire delivery, was engaged in commerce as defined by Section 3(b) of the Fair Labor Standards Act and entitled to receive the benefits of the applicable provisions of the law.

The employee directs his exception to the denial, in the trial court, of his claim for unpaid minimum wages and overtime compensation alleged to be due him under Section 6(a) and 7(a) of the Fair Labor Standards Act during his further employment by the defendant corporation *from early in January, 1939, until July 24, 1940, when he quit work.* His employer had then discontinued its interstate sales and deliveries in New Hampshire and was carrying on a strictly local wholesale business. For the first three months of this period the employee continued to work as night shipper, putting up orders and loading trucks, but all for local delivery to retail dealers in Maine. During his subsequent employment he drove a light truck distributing

merchandise to the same local trade. The employer was still buying in out of state markets but when the shipments were unloaded into its store and warehouse in Portland the merchandise was owned and held by it there solely for local sales and deliveries to domestic retail dealers for direct resale to consumers. With exceptions of minor importance and not here controlling, this status continued without interruption. The merchandise "was not held, used or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states." Its interstate movement had ended. Subsequent local sales and deliveries were purely intrastate activities and in these this employee was solely engaged. Schechter Poultry Corp. v. United States, 295 U. S. 495, 543, [fol. 9] 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947; Atlantic Coast Line R. Co. v. Standard Oil Co., 275 U. S. 257, 267, 48 S. Ct. 107, 72 L. Ed. 270; Public Utilities Commission v. Landon, 249 U. S. 236, 245, 39 S. Ct. 268, 63 L. Ed. 577.

(2, 3) The employee, through counsel, argues, however, that, even though he was engaged solely in intrastate commerce in the latter periods of his employment by the defendant corporation, his hours and wages so adversely affected interstate commerce that they became subject to federal control under the Fair Labor Standards Act, and for violation thereof, recovery may be had as there provided. This contention did not prevail in the trial court and cannot here. It is, of course, a familiar principle that Congress may not only regulate transactions which are a part of interstate commerce but may also protect that commerce from injuries which result from the conduct of those engaged in intrastate operations. But it is elementary that in order to subject intrastate transactions to federal control they must directly affect interstate commerce and if their effect is merely indirect the transactions remain within the "domain of state power." It is well settled now that the hours and wages of persons employed in purely intrastate commerce have no direct relation to interstate commerce and an attempt to fix such hours and wages by regulation is not a valid exercise of federal power. Schechter Poultry Corp. v. United States, supra. See National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 29, 57 S. Ct. 615; Carter v. Carter Coal Co., 298 U. S. 238, 309, 56 S. Ct. 855; United States v. Butler, 297 U. S. 1, 75, 56 S. Ct. 312.

In Schechter Poultry Corp. v. United States, supra, the question of the right of federal control over the wages and hours of the defendant's employees under the Live Poultry Code, 48 Stat. 195, 196, 15 U. S. C. A. #703, was presented for determination. On a finding that the employees were handling poultry after it was received in interstate commerce into the defendant's slaughter house markets solely for sale to local retailers for resale, it was held that the employees were engaged in purely intrastate commerce, their hours and wages had no direct relation to interstate commerce, and the attempt through the Code to fix the hours and wages was not a valid exercise of federal power. In delivering the opinion of the Court, Mr. Chief Justice Hughes said:

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. * * * where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control. * * *

"It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, [fol. 10] between commerce 'among the several States' and the internal concerns of a state."

The *decision in the Schechter case and the doctrines there enunciated are still in force and effect despite unauthoritative advices to the contrary.* On the point under consideration the factual situations there and here are entirely parallel and, despite the differences in the statutes under which government control of hours and wages in an intrastate business is attempted or invoked, the principles involved are the same. We find no valid ground upon which the cases can be distinguished. The decision of the Supreme Court of the United States upon the question of the interpretation and application of the commerce clause of the Federal Constitution, U. S. Const., Art. 1, #8, cl. 3, is conclusive and binding upon this court. We concur with the learned Justice presiding below that it cannot be held in this action that the hours and wages of the plaintiff employee while he was working in the defendant's purely intrastate business so affected interstate commerce that they are subject to federal control under the Fair Labor Standards Act.

No error in the rulings below being made to appear, the exception reserved must be overruled.

Exception overruled.

I certify that the foregoing is a true copy of the opinion in the above entitled case.

Gail Laughlin, Reporter of Decisions.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 11] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 8, 1942

On consideration of the motion for leave to proceed further herein *in forma pauperis*,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 12] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 8, 1942

The petition herein for a writ of certiorari to the Supreme Judicial Court of the State of Maine is granted. In view of the Act of August 24, 1937 (28 U. S. C. sec. 401), the Court hereby certifies to the Attorney General of the United States that the constitutionality of the Fair Labor Standards Act is drawn in question in this case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1087)

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 97

ANSEL HIGGINS,

Petitioner,

vs.

CARR BROTHERS COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

BRIEF FOR PETITIONER.

EDWARD B. PERRY,
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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 97

ANSEL HIGGINS,

Petitioner,

vs.

CARR BROTHERS COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

BRIEF FOR ANSEL HIGGINS, PETITIONER.

Opinions Below.

The opinions below have not as yet been officially reported. The opinion of the Justice of the Superior Court for Cumberland County, dated May 5, 1941, is printed commencing on Page 1 of the Transcript of Record. The opinion of the Supreme Judicial Court of the State of Maine, dated February 25, 1942, is printed commencing on Page 5 of the Transcript of Record.

Jurisdiction.

Petition for writ of certiorari was docketed May 20, 1942. Certiorari was granted June 8, 1942. Jurisdiction is conferred upon this Court by section 237 (b) of the Judicial Code as amended by Act of February 13, 1925.

Statement of the Case.

This was an action brought by the petitioner to recover from the respondent unpaid minimum wages and unpaid overtime compensation for the period from October 24, 1938, to July 24, 1940, and an additional equal amount of liquidated damages, pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 52 Stat. 1060).

It was alleged by the petitioner that both the petitioner and the respondent were engaged in interstate commerce during said period and that Sections 6 and 7 of said Act were violated by the respondent in respect to the payment of minimum wages and overtime compensation.

The plea of the general issue was filed with a brief statement of special matter of defense denying the petitioner and respondent were engaged in interstate commerce.

The writ was dated April 1, 1941, and by agreement of counsel entered as of the April Term, 1941, in the Superior Court, judgment to be rendered at the return term upon evidence given in the case of *Robert W. Ricker, et als.* v. *Carr Brothers Company*, No. 7946, heard at the March Term of said court, in so far as said evidence should be pertinent to this action. Right to except as to matters of law was reserved by both parties.

In the finding of court the Justice found that respondent was engaged in the sale and distribution of fruits, vegetables and groceries to the retail trade, obtaining part of its merchandise from local sources and part from without

the state. During the first ten weeks of the above named period, the finding of court states, deliveries of respondent's merchandise were made in New Hampshire and both petitioner and respondent were engaged in interstate commerce for said ten weeks and a recovery was allowed for this ten weeks; HOWEVER, the finding of court further states that after these deliveries to New Hampshire stopped then the transactions ceased to be interstate in character and the provisions of the Act did not apply thereafter. (Tr. 1.)

Petitioner claimed that in the court's finding, commerce, within the meaning of the Fair Labor Standards Act, did not exist during the whole period of petitioner's employment, was an error of law and that he was aggrieved thereby; and exceptions were taken and allowed, and overruled by the Supreme Judicial Court of Maine. (Tr. 5.)

Description of Respondent's Business and of the Duties of Respondent's Employee.

Respondent is a corporation, which conducts a wholesale produce and grocery business at No. 217 Commercial Street, Portland, Maine. Respondent handles a general line of fresh fruit and vegetables, canned goods, nuts, candy, cheese, pickles, etc. In 1940 its gross sales amounted to nearly $500,000.00. It employs approximately twenty-five employees, including warehousemen, truck drivers, office workers, salesmen, laborers, etc.

Shipments from out of the state arrive daily at the respondent's warehouse by means of the common agencies of interstate transportation. From 50% to 60% of its purchases come from without the state. Some commodities are shipped in by rail and some by trucks. Other goods are picked up by the respondent's own trucks from pool cars, freight stations, or the warehouses of brokers or manufacturers' agents in Portland.

A great bulk of respondent's goods move through the warehouse and are delivered to respondent's customers in the same package, bag or carton in which they are received.

Respondent has been in the wholesale business in Portland since 1909. The great majority of its customers are regular customers to whom respondent has sold for many years. The stock of goods in the warehouse corresponds substantially to the amounts necessary to fill recurring orders received in the usual course of trade.

Rapid turnover is the rule in respondent's business. Profit is made only when the goods move to the retailer. The longer any particular item remains in stock the greater must be the charges made against it for interest on inventory investment, for insurance, for warehouse space, and other charges, and the greater the risk of spoilage and deterioration or that the product will lose favor with customers. In other words, in respondent's business, no profit is made on storage. It is essential to maintain as high a turnover rate as possible and to keep the goods moving.

While occasionally respondent may purchase a stock of some items several months in advance, most items remain in the warehouse no longer than necessary to match orders which are coming in from continually recurring sources along well defined routes. There is no need for respondent to maintain a larger stock, for most items handled can be secured within a few days from out-of-state concerns; many items can be shipped over night if ordered by wire or long distance telephone. Frequently, orders come in for products which are out of stock and respondent must make purchases to fill such orders. In some cases, the goods are without the state at the time the orders are taken.

The area in which the respondent distributes goods corresponds roughly to the general area of distribution of other competing wholesalers operating both in and outside of the State of Maine. Wholesalers competing directly

with respondent not only typically receive the bulk of their goods from outside of the state in which their warehouses are located, but substantial amounts of the goods which they handle are shipped out by them across state lines.

The evidence shows that customers in Maine are served by wholesalers in other New England States. For example, it is shown by the evidence that respondent competes with a wholesaler located in Boston. In other words, trading areas of wholesalers competing with respondent frequently overlap state lines. Respondent can, therefore, by underselling, cause Boston wholesalers to lose Maine customers and thereby divert the normal flow of goods in interstate commerce, although respondent itself might distribute nothing across state lines.

Wholesalers compete primarily on a price basis and the industry is extremely sensitive to price competition. Quality is standardized and there can be little difference in service. Labor costs concededly constitute a large proportion of total operating expenses. The margin of profit in wholesaling is relatively small, so that increased or decreased labor costs are unavoidably reflected in price. A wholesaler paying lower wages than his competitors or reducing his labor costs by exacting long hours of work, translates his saving in labor costs into lower prices. Such underselling forces others to meet the competition and encourages and promotes the lowering of labor standards by competitors so that they can meet the lower prices. The only alternative to meeting the prices is to relinquish the business, thus restricting interstate competition.

Wholesalers are middlemen situated at an intermediary point in the flow of goods in the channels of commerce from manufacturers to retailers. Their business is that of distribution, the gathering together of products from all parts of the United States, assembling them as needed by their customers and transporting them to the many retail and

institutional outlets. The wholesaler furnishes the connecting link between the interstate shipper on the one hand and the retail stores and consumers on the other hand. The products move rapidly and continually through the hands of the wholesalers without any change in form and for the most part without even being unwrapped. The products must move smoothly and rapidly through the wholesalers if the incoming interstate movement is not to be obstructed.

Its business is a focal point in the distribution and a strike over wages and hours would immediately result in the blocking of the movement of goods into and from the respondent's warehouse. All shipments from out of the state to the respondent would have to cease. The flow of goods from Massachusetts, Florida, California and New York would most certainly be disrupted. Such strikes have repeatedly occurred in the wholesale trade and the respondent is not immune from a similar action by its employees.

By far, the most frequent immediate cause of strikes has been the demand for shorter hours and increased wages or a resistance to decreased wages.

Petitioner was in the employ of the respondent from October 24, 1938 to July 24, 1940. From October 24, 1938 to April 1, 1939, he worked from 8 o'clock in the evening until 8 o'clock in the morning, six days a week, putting up orders, handling freight and taking care of customers. From April 1, 1939 to July 24, 1940 he worked from 6:30 o'clock in the morning until 6 o'clock in the evening, five days a week, and on Saturdays from 6:30 in the morning until 1:30 in the afternoon, working both inside the warehouse and on the local delivery truck. On all days except Saturday, one hour was taken out for lunch. During this whole period petitioner received $16.00 a week as wages. Amount claimed due, including liquidated damages, is $616.38.

Violations of Wage and Hour and Record Keeping Provisions.

The evidence is uncontroverted that the respondent has violated the minimum wage provisions, the overtime compensation provisions, and the record keeping provisions of the Act. These violations occurred in the case of the petitioner and practically all of the other employees. On July 24, 1940, a time clock was installed at respondent's warehouse on the insistence of the Wage and Hour Division.

Statutory Provisions and Regulations Involved.

The preamble of the Fair Labor Standards Act states that the purpose of the Act is "to provide for the establishment of fair labor standards in employments in and affecting interstate commerce." In Section 2 of the Act, Congress found that the existence of labor conditions detrimental to the "maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," burdens commerce and the free flow of goods in commerce, constitutes an unfair method of competition in commerce, leads to labor disputes and interferes with the orderly and fair marketing of goods in commerce.

Section 6 of the Act provides that every employer shall pay to each of his employees who is engaged in commerce [1] or in the production [2] of goods for commerce not less than

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[1] Section 3 (b) defines "commerce" to include "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

[2] Section 3 (j) defines "produced" as produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

the minimum wages prescribed. During the first year from the effective date of the Act (October 24, 1938), the minimum wage rate was 25 cents an hour. On October 24, 1939, the minimum rate become 30 cents.

Section 7 provides that no employer shall employ any employee engaged in interestate commerce or in the production of goods for interstate commerce for a work week longer than 44 hours during the first year from the effective date of the Act unless such employee received compensation for his employment in excess of 44 hours a week at a rate not less than one and one-half times the regular rate at which he is employed. On October 24, 1939, the maximum work week became 42 hours. On October 24, 1940, the maximum work week became 40 hours.

Assignment of Error.

The petitioner assigns as error the denial, in the Supreme Judicial Court of the State of Maine, of his claim for unpaid minimum wages and overtime compensation, alleged to be due him under Section 6 (a) and 7 (a) of the Fair Labor Standards Act, earned during his employment by the respondent from January 1, 1939, until July 24, 1940, on the ground that the respondent was not in commerce within the meaning of said Act during this period.

Issue Presented.

Respondent denies that it was engaged in interstate commerce and denies that its employee was engaged in interstate commerce within the meaning of the Fair Labor Standards Act. The issue, therefore, is:

Were the petitioner and the respondent "engaged in commerce" within the meaning of the Act for a longer period than the first ten weeks following effective date of the Act.

ARGUMENT.

Introduction.

As is apparent, the question in this case is whether respondent's employee was engaged "in commerce or in the production of goods for commerce" within the meaning of that term as used in the Fair Labor Standards Act after January 1, 1939. Petitioner contends that as respondent's employee, he was engaged in commerce within the meaning of the statute and will show that:

(1) Respondent's employee was "engaged in commerce" as that term has been defined by the courts;

(2) The purposes of the Act and the legislative history confirm the conclusion that respondent's employee was engaged in commerce within the meaning of the statute;

(3) Regulation of the wages and hours of the respondent's employee was unquestionably within the constitutional power of Congress.

1.

Respondent's Employee Was "Engaged in Commerce" Within the Meaning of the Fair Labor Standards Act.

A.

Respondent's Employee Was "Engaged in Commerce As That Term Has Been Defined by the Courts.

In one of the earliest decisions of the Supreme Court on the meaning of the "commerce" clause of the Constitution, *Gibbons* v. *Ogden*, 9 Wheat. 1, Chief Justice Marshall devoted considerable space to defining the term "commerce • • • among the several states." The Chief Justice emphasized that the term is "a general term applicable to many objects" (p. 188). He said:

> Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all of its branches, • • •. The word "Among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior. (Pp. 186, 192.)

A half century later, the Supreme Court reaffirmed this doctrine in *Walton* v. *The State of Missouri*, 91 U. S. 275 at 280:

> Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities • • •

The scope of the term "engage in commerce," as used in the Fair Labor Standards Act, even if not regarded as co-extensive with the utmost limits of the commerce power of Congress, does comprehend transactions of the character involved in this case. "Commerce," said the Supreme Court in *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282 at 290:

> • • • is not confined to transportation from one State to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one State are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages.[3]

[3] The original package doctrine has recently lost some of its significance as a limitation upon the taxing power of the states. (See *McGoldrick, etc.* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33). It is clear that the doctrine has never been regarded as marking the end of interstate

Where, as in the case at bar, the whole course of business involves a constant flow of goods in interstate commerce pursuant to continually and regularly recurring orders for merchandise produced only by out-of-state concerns, the "commerce" embraces "all the component parts of that intercourse," including the passage of the merchandise through respondent's warehouse and the sale and delivery thereof to their retail customers. Negotiating and contracting for the sale of, and purchasing, selling, assembling, handling and distributing merchandise shipped from one state to another have repeatedly been held to be part of "commerce" within the regulatory provisions of federal statutes. Particularly pertinent here are the decisions holding that wholesalers, commission men and similar intermediary distributors engaged in such activities are engaged in commerce within the meaning and purposes of the Federal Trade Commission Act, the Anti-Trust Act and the Packers and Stockyards Act. The Fair Labor Standards Act seeks to accomplish, among other purposes, the same ends as all of these statutes, that is, to protect commerce against unfair methods of competition, against burdens upon the free flow of goods in commerce, and against interferences with the orderly and fair marketing of goods in commerce.[4]

In *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, the Federal Trade Commission issued a cease and desist order against an association of

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commerce, (see *McDermott* v. *State of Wisconsin*, 228 U. S. 115, 136-137; *Binderup* v. *Pathe Exchange Incorporated, et al.*, 263 U. S. 291 at 311.) It has been consistently recognized that interstate commerce continues at least as long as the imported goods are in the original packages. *Brown* v. *Maryland*, 12 Wheat. 419; *Dahnke-Walker Milling Co.* v. *Bondurant*, *supra*; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500 at 521; *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*, at p. 46.

[4] Recently the Supreme Court took occasion to characterize the Fair Labor Standards Act as one which "seeks to eliminate competition which thrived upon low wages and substandard working conditions." *Apex Hosiery Co.* v. *Lander*, 310 U. S. 469, 595, see note 24.

wholesalers requiring it to abandon the circulation of agreements which fixed prices for sales of merchandise supplied from sources outside of the state. The association claimed that since the seller had the option under the contracts of sale to furnish the goods from local or out-of-state sources of supply, the sales were not in interstate commerce and the fixing of prices was not an unfair method of competition in commerce. The question, as stated by the court, was "whether the sale by the wholesaler to the retailer in the same State is a part of interstate commerce where, subsequently, at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in another state to or for the retailer." (273 U. S. at 63-64.) After reiterating that commerce is a "practical" conception, the Court, speaking through Mr. Justice Butler, held:

> And what is or is not interstate commerce is to be determined upon a broad consideration of *the substance of the whole transaction;* Dozier *v.* Alabama, 218 U. S. 124, 128. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one State to another. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S., 262, 290; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 30, 33. *The absence of contractual relation between the manufacturer and retailer does not matter.* The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the State. If the contract of sale provided for shipment to the purchaser from a mill outside the State, then undoubtedly it would be an essential part of commerce among the States. *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 515. Clearly the absence of such a provision does not affect the substance

> of the matter when in fact such a shipment was contemplated and made. *Cf. Dozier* v. *Alabama*, supra; *Western Union Tel. Co.* v. *Foster*, 247 U. S. 106, 113; *Lemke* v. *Farmers Grain Co.*, supra, 55. The election of the seller to have the shipment made from a mill outside the State makes the transaction one in commerce among the States. *And on these facts the sale by jobber to retailer is a part of that commerce.* (Emphasis Supplied) (at 64).

It is significant, in the case at bar, that in the normal course of respondent's business there is not even the contingency that they will fill their customers' orders from sources of supply in the State of Maine since most of the commodities ordered by their customers are not produced in Maine at all. Both respondent and its customers well know that the merchandise they order, week in and week out, must come from out-of-state suppliers.

The absence of an express prior contract between respondent and its customers is inconsequential under the facts of this case. "Clearly the absence of such a provision does not affect the substance of the matter," when in fact it is well known from long practice that the usual source of the business involves shipments from outside the state to supply the retailer, and "when in fact such a shipment was contemplated and made." *Federal Trade Commission* v. *Pacific States Paper Assn., supra* at 64; See also *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 at 54. Certainly if the term "commerce" is to be given the "practical" application required by the decisions of the Supreme Court (Cf. *Swift & Company* v. *United States*, 196 U. S., 375, 396; *Federal Trade Commission* v. *Pacific States Paper Assn.*, supra at 64; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S., 453, 465), a shipment from outside the state to meet an order anticipated by long custom is no less commerce than a shipment to meet an express prior order.

Further confirmation of these principles is found in the case of *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291. New York manufacturers and distributors of motion picture films shipped the films from New York to their several exchanges in Omaha, Nebraska. The distributors at the Nebraska exchanges contracted in turn with exhibitors in Nebraska for the leasing and display of the pictures at named theatres. Deliveries of the films were made through the Omaha exchange. A Nebraska exhibitor brought suit under the Anti-Trust Act against the New York distributor corporations and the distributors at Omaha, alleging a conspiracy in restraint of interstate commerce. The defendants claimed that once the films reached Omaha they ceased to be in interstate commerce and that the Sherman Act was inapplicable. They pointed out that after the films were sent to the Omaha agencies, "they are unpacked and stored at the local offices of the defendants until they begin to rotate among the exhibitors of Nebraska." They contended that the films "become and remain a part of the general property in Nebraska during their entire commercial life;" and that "When a Nebraska exhibitor wishes to rent a film from any of the defendants, he rents it from the Omaha exchange, and, no interstate transaction or movement of the film is involved." (263 U. S. at 297) The majority of the Court of Appeals for the Eighth Circuit, citing a number of cases involving the state power to tax and the fixing of freight rates, sustained this contention, holding that interstate commerce in the films had ceased after delivery to the Omaha agencies. *Binderup* v. *Pathe Exchange*, 280 Fed. 301, 303.

The Supreme Court, through Mr. Justice Sutherland, flatly rejected this argument. At page 309 he said:

> • • • Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held

until delivery to the lessee in the same state, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to the final destination. The general rule is that where transportation has acquired an interstate character "it continues at least until the load reaches the point where the parties originally intended that the movement should finally end." *Illinois Central R. R. Co.* v. *Louisiana R. R. Comm.*, 236 U. S. 157, 163. And see *Western Union Tel. Co.* v. *Foster*, 247 U. S. 105, 113; *Western Oil Refining Co.* v. *Lipscomb* 244 U. S. 346, 349.

Respondent, like the Omaha Exchanges, "represent" out-of-state producers in the marketing of their products. The existence of an express agency relation between the producer and the distributor cannot be regarded as the controlling factor in determining whether the distribution is in interstate commerce. "Commerce among the states," as Mr. Justice Holmes pointed out in *Swift and Company* v. *United States*, 196 U. S. 375, 398, "is not a technical legal conception but a practical one drawn from the course of business." In the *Binderup* case the wholesale distribution of films was done through exchanges operated by the producers. The wholesale distribution of groceries ordinarily is accomplished through independent dealers. But the course of business—the flow of merchandise in interstate commerce to the retailer—is the same. The delivery to the grocery wholesaler does not "end the movement of the commodity"; his handling and distribution of such merchandise is part of and incidental to the stream of commerce to the ultimate destination. And it is of no consequence whether the distribution is carried on through an agent of the manufacturer or through a more independent

dealer. It is commerce, not the ownership of goods moving in it, with which the Fair Labor Standards Act is concerned.

Thus, in the famous case of *Stafford* v. *Wallace*, 258 U. S. 495, the Supreme Court held that the buying and selling of cattle in local stock yards and the charges and practices of the dealers and commission men who negotiate the purchases and sales are activities which "cannot be separated from the movement" and are "indispensable to its continuity." The Court said:

> The stockyards are but a throat through which the current flows and *the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character.* The commission men are essential in making the sales without which the flow of current would be obstructed, and this whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. *The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but on the contrary, being indispensable to the continuity.* (at p. 516.) (Emphasis supplied.)

Decisions holding distributive activities similar to respondent's business operations to be interstate commerce can be multiplied. Exhaustive discussion of these cases is neither necessary nor practicable within the limits of this brief but reference should be made to a few of the decisions relating to grocery wholesalers whose methods of doing business were strikingly similar to respondent's methods.

In *Grand Union Tea Co.* v. *Evans*, 216 Fed. 791 (D. C. D. Oregon, 1914), the plaintiff sought an injunction against the collection of a state license tax imposed upon peddlers. The question was whether the law, as applied to the plaintiff's representative was an unconstitutional interference

with interstate commerce. The court described the plaintiff's method of doing business as follows:

> From the complaint it appears that the plaintiff is a New Jersey corporation engaged in selling goods prepared and manufactured for it by Jones Bros. Company, a New York corporation. The goods, when manufactured, are packed and marked with the label and name of the plaintiff and delivered to it at the factory, from which place they are forwarded by the plaintiff for sale and distribution to various parts of the Union. The plaintiff maintains a store in Portland where a small part of its merchandise is sold at retail over the counter, but the principal part of its business in Oregon is done through solicitors who go regularly from place to place on fixed routes soliciting and taking orders for future delivery. The orders, when taken, are sent to the Portland store by mail, or taken there personally by the solicitors, where they are filled and the goods shipped to or delivered to the solicitors, who deliver the same to the customers and collect the purchase price on their next trip over their respective routes.
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> * * * experience has shown the manager thereof about how many orders will come in each day and each week in the usual course of trade, and in order to fill the continually recurring orders, he will anticipate by a few days only, the procurement of goods sufficient to fill such orders by ordering them from places outside of the state. Goods not of a perishable nature, such as soap and baking powder, are sent from the home office by water to Portland. These goods are, to some extent, kept in stock, but the orders of the Portland store are not greater than may be received in car load lots and as are necessary to fill the constantly recurring orders. Practically all the other goods such as teas, coffees, chocolates, cocoas etc. are ordered from Seattle in the State of Washington in no greater amounts than necessary to fill the recurring orders

> received in the usual course of trade, and so as to match orders which are being taken when the goods to fill them are in transit.

The court held that this business was interstate commerce despite the fact that there were no definite orders from customers prior to the shipments of merchandise:

> It would be a waste of time to review the cases and point out their similarity and dissimilarity to the one in hand. It is enough that in our opinion the facts stated in the complaint bring this case within *Crenshaw* v. *Arkansas*, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. ed. 563, and *Stewart* v. *Michigan*, 232 U. S. 565, 34 Sup. Ct. 476, 58 L. Ed. 736, decided March 23, 1914. The only difference, if any, between it and the Crenshaw case is that it may be assumed, although not stated, that in the Crenshaw case the goods were not ordered by the local representative of the vendor until the customers' orders had been received by him, while in this case, *the shipments were ordered prior to the actual receipt of the customers' orders by the agent*, but before or while such orders were being taken in the field and during the time the goods were in transit. This we take it, does not affect the character of the business. It was a mere matter of detail in the manner of conducting it.

Similar emphasis was placed on the continually recurring character of the interstate purchases and the "constant current of trade and commerce in commodities so purchased" in the decision of the Fifth Circuit Court of Appeals in *Wholesale Grocers' Ass'n.* v. *Federal Trade Commission*, 277 Fed. 657 (C. C. A. 5th, 1922).

In that case, an association of jobbers and wholesalers doing business in El Paso, Texas, combined to keep manufacturers from selling products to a competing wholesaler who also was operating several retail grocery stores in El Paso. The Court of Appeals held that the Associated Job-

bers thereby prevented a competitor "from buying as a wholesaler in interstate commerce as it would have done without such opposition" (at 662), and combined "by that means to obstruct or prevent that company from competing as a wholesaler." (at 664) The court held that such activities were clearly unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act, emphasizing the fact that the boycotted company "purchases commodities dealt in by it in the various states and territories of the United States, and transports the same through other states, and territories to the City of El Paso in the State of Texas, where such commodities are resold, and there is continuously * * * a constant current of trade and commerce in commodities so purchased by the said * * * company between and among the various states and territories of the United States." (P. 658.)

See also *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600 upholding the Federal Trade Commission's right to enjoin a group of retailers from combining to boycott a wholesaler so as to prevent such wholesaler from competing for local retail trade; *Federal Trade Commission* v. *Wallace*, 75 F. (2d) 733, (C. C. A. 5th, 1935); *Southern Hardware Jobbers' Ass'n. et al.* v. *Federal Trade Commission*, 290 Fed. 773 (C. C. A. 5th, 1923).

In *Schechter Corp.* v. *United States*, 295 U. S. 495, the transactions involved were as follows: Live poultry was shipped by rail from other states to the Manhattan Terminal in New York City and to terminals in New Jersey serving New York City. The poultry was received at the terminals by commission men or "receivers." The receivers would have the poultry unloaded at the terminals, inspected and put into coops. They would sell some of the poultry at the terminals, but the remainder was loaded on trucks and trucked to the West Washington Market in New York City

where further sales were made by the commission men. A large proportion of these sales of poultry were made to purchasers (such as the Schechter Corporation) from the West Washington Market, after the poultry had been trucked from the terminal where it was first received. The Supreme Court, in effect, held that the interstate commerce continued through the sale by the receivers and until delivery to the purchasers' slaughter houses. The court pointed out that the Code provisions there invalidated concerned the operations by the purchasers from the commission men and did not "concern the transportation * * * or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees" to their customers (at 542). The Court continued:

> When *defendants* [customers of the commission men] had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the city, or elsewhere, the poultry was trucked to their slaughter houses in Brooklyn for local disposition. The interstate transactions in relation to that poultry *then* ended. (Emphasis supplied.)

The "interstate transactions" prior to the arrival of the poultry at defendants' slaughter houses included (a) the receiving of the poultry by the commission men, (b) unloading of the poultry at the terminals, (c) putting the poultry in coops, (d) loading it on trucks and trucking it from the terminals to the West Washington Market, (e) the sales by the commission men at the market and (f) trucking the poultry to the slaughter houses of the purchasers. In other words, the "interstate transactions" included all of "the transactions of the commission men" and in addition included the delivery of the goods from the place of business of the commission men to the place of business of their customers.

The respondent here occupies the same place in the stream of commerce as the commission men in the *Schechter*

case and not the place which the Schechters occupied. Respondent, like the commission men, receives most of its goods directly from out-of-state sources. As the commission men unload, coop, inspect, and assemble their poultry at the terminals and at the market place before sale and distribution, so respondent unloads and assembles its merchandise at its warehouse. The commission men distribute their poultry to customers who slaughter and then resell, while respondent distributes its goods to retailers who merely resell without processing of any kind. In short, respondent's transactions are no further removed from the interstate movement than the activities recognized as "interstate transactions" in the *Schechter* case.

It necessarily follows from what we have already shown that the employees who perform and execute respondent's transactions in interstate commerce are themselves engaged in interstate commerce. In fact, unloading and warehousing of interstate shipments have specifically been held to be part of interstate commerce even under statutes of far more limited application than the Fair Labor Standards Act.[5]

In *B. & O. S. W. Railroad* v. *Burtsch*, 263 U. S. 540 (1924), a shipment of heavy machinery came into Indiana from

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[5] This conclusion is made doubly clear by the earlier decision of the Supreme Court in *Local 167* v. *United States*, 291 U. S. 293, where the court affirmed an injunction against a conspiracy to violate the Anti-Trust Act by marketmen, teamsters and slaughterers in the live poultry industry in and about New York City.

It has some times been assumed that the *Schechter* case, or at least certain dicta in the case, are authority for the claim for a narrow construction of "interstate commerce;" Any such implication attributed to that case is in conflict with the later decisions of the Supreme Court. See *Jones and Laughlin Steel Corp.* v. *N. L. R. B.*, 301 U. S. 1, 40; *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 303 U. S. 453; *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197; *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601. In each of these cases the minority of the court was of the opinion that the *Schechter* case had been repudiated by the majority. *Jones and Laughlin Steel Corp.* case, *supra* at 76; *Santa Cruz Fruit Packing Co.* case, *supra*, at 470; *Consolidated Edison Co.* case, *supra*, at 241; *N. L. R. B.* case, *supra*, at 612-614. See also *N. L. R. B.* v. *A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4th).

Kentucky. One of the purchasers came to the side track and helped the railroad employee unload the machinery from the car. The purchaser was injured in the process of unloading. The Supreme Court, through Mr. Justice Sutherland, held that the unloading was so closely related to the interstate shipment as to be a part of it within the meaning of the Federal Employers Liability Act.

> It is too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically part of it • • •

In the case of *Erie R. R. Co.* v. *Stuart*, 250 U. S. 465 (1919) suit was brought against the railroad for negligent injury to stock "during transportation". The stock had been injured by a collision while the freight car was on a spur track being unloaded. It was urged in the case that the transportation had ended when the accident occurred. The court held that the interstate transportation "was still in progress" and continued through the unloading.

This ruling was reaffirmed by the Supreme Court in *Union Stock Yard Co.* v. *United States*, 308 U. S. 213. In that case, appellant argued that since its business was separated from the railroad's business and since it exercised no control or participation in the operation of the railroad, its loading and unloading business was not part of the transportation within the regulatory power of the Interstate Commerce Commission. The court rejected this argument holding that the transportation ended "only after unloading for delivery or tender to the consignee at the place of destination". (308 U. S. at 219.) See also *Puget Sound Stevedoring Co.* v. *State Tax Commission of Washington*, 302 U. S. 90 (1937).

In regard to warehousing activities, the Supreme Court, in an opinion by Mr. Justice Hughes, held that the ware-

housing of goods by a railroad after the arrival at the point of destination is "a terminal service forming a part of the 'transportation' in the sense of the Federal Act and covered by that Act;" that it is "incident to interstate shipment". *Southern Railway* v. *Prescott*, 240 U. S. 632, at 638. To the same effect see *Cleveland C. C. & St. L. Railway* v. *Dettlebach*, 239 U. S. 586.

It is significant that these decisions were concerned only with *transportation*, which is but one phase or aspect of *commerce*. The Fair Labor Standards Act is not limited in its application to transportation but covers all employees who are engaged "in commerce".[6] And it is clear from the Supreme Court decisions made such as *Gibbons* v. *Ogden*; *Federal Trade Commission* v. *Pacific Paper Assn.*; *Binderup* v. *Pathe Exchange*; *Swift* v. *United States*; *Stafford* v. *Wallace*; all discussed in full above, that the stream of "interstate commerce extends considerably beyond unloading and warehousing. These, and numerous other decisions of the Supreme Court, have indicated that a remedial statute, of the character of the Fair Labor Standards Act, must be given a practical application, an application which comprehends "all commercial intercourse between different states *and all the component parts of that intercourse.*" *Federal Trade Commission* v. *Pacific Paper Assn.*, 273 U. S. 52 at 63.

[7] It is obvious from the decisions that the fact that the

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[6] "Commerce covers the whole field of which transportation is only a part." *Chicago & North Western Ry. Co.* v. *Belle*, 284 U. S. 74, at 78. See also *Pennsylvania R. R. Co.* v. *Public Utilities Commission of Ohio*, 298 U. S. 170 at 174; *Atlantic Coast Line Ry.* v. *Railroad Commission of Georgia*, 281 Fed. 321 (D. C. N. B., Ga. 1922).

[7] See in addition to the cases discussed in the text, *Virginian Ry.* v. *Federation*, 300 U. S. 515, holding "back shop" employees, engaged in repairing locomotives and cars completely withdrawn from service for periods as long as three months, to be engaged in interstate operations within the scope of the Railway Labor Act; *York Manufacturing Co.* v. *Colley*, 247 U. S. 21, holding installation of ice machinery shipped from

activities take place locally does not mean that they are not part of interstate commerce. As the Supreme Court recently pointed out in the case of *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167:

> • • • The regulatory power of the Congress is customarily exercised on transactions taking place within the state on the principle that such acts are an essential part of interstate commerce (at 179, footnote 39).

Also, in determining whether activities are within the stream of interstate commerce, it is of little significance whether the activities take place at the beginning or at the end of the interstate journey. In the *Pacific Paper Case*, the *Binderup* case, the *Dahnke-Walker* case, the *Burtsch* case, the *Erie Railroad* case, and the *York Manufacturing Co.* case—in all these cases the activities held to be part of interstate commerce where at the end of the interstate

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outside the state was "immediately and inherently connected with interstate commerce", (at p. 26) although the installing consumed about a month after the machinery reached its destination; *Kansas City Southern Railway Co.* v. *Martin*, 262 Fed. 241 (C. C. A. 5th, 1920); and *I. C. R. Co.* v. *Porter*, 207 Fed. 311 (C. C. A. 6th, 1913), holding employees engaged in the repair of a railroad track or railroad bridge to be engaged in interstate commerce within the meaning of the Employers Liability Act. See also *Currin* v. *Wallace*, 306 U. S. 1, 9, and *Mulford* v. *Smith*, 307 U. S. 38, 48, holding that sales of tobacco in a local warehouse "constitute interstate commerce," where in the regular course of business purchasers would subsequently ship most of the tobacco out of the state.

In a recent case involving the application of the Fair Labor Standards Act the Federal District Court in Texas held that "red caps" engaged in carrying baggage at a railroad terminal were engaged in commerce, and stated the applicable test as follows: "The rule which is now recognized and which has been reiterated, is, that the test of whether an employee is engaged in interstate commerce, is whether he was so engaged, or, in work so closely related to such transportation as to be practically a part of it; whether he facilitates interstate commerce." *Pickett* v. *Union Terminal Co.*, 33 F. Supp. 244, 247 (D. C. N. D. Texas, 1940).

journey and no further shipment across state lines was contemplated.[8]

B.

The Purposes of the Act and the Legislative History Confirm the Conclusion that the Respondent's Employee Was Engaged in Commerce Within the Meaning of the Statute.

The decisions just discussed establish that respondent and its employee were engaged in commerce. This is sufficient basis for concluding that they are subject to the terms of the Fair Labor Standards Act. If further confirmation were needed, ample evidence is to be found in the purposes sought to be accomplished by the Act and in the legislative history. Examination of the Fair Labor Standards Act indicated purposes which are not narrow, but at least as broad as the similar purposes of the Railway Labor Act, the National Labor Relations Act, the Packers and Stockyards Act, the Federal Trade Commission Act, and the various federal anti-trust laws. As the decisions amply demonstrate, Congress has attempted by these laws to prevent or control unfair methods of competition in commerce and to eliminate restraints and burdens upon the free flow of commerce among the states.

The underlying aims of the Fair Labor Standards Act were aptly summarized in the recent opinion of the Circuit

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[8] The United States Wholesale Grocers Association, shortly after the Act was passed, distributed the opinion of its counsel advising that employees of wholesale grocers purchasing merchandise across state lines come within the provisions of the Fair Labor Standards Act, including wholesalers who resell entirely within the state where the goods are received.

In the recent case of *Fleming* v. *Alterman Bros.*, 38 F. Supp. 94, Judge Russell of the U. S. District Court of Georgia, rendered an opinion holding that an importing wholesale grocer which does not ship out of the state is covered by the Act. Alterman Bros. conduct a business similar to the defendant.

Court of Appeals for the 8th Circuit in *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52:

> In Section 2 of the Act, the findings of Congress are stated, to the effect that there exists in industries engaged in interstate commerce labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers, which have caused an unwholesome state of affairs in intertsate commerce, resulting in such conditions being perpetrated among the workers of the several states and burdening commerce and the free flow of goods in commerce, and resulting also in unfair methods of commerce, labor disputes, and interference with the orderly and fair marketing of goods in interstate commerce. The preamble may be properly referred to to assist in ascertaining the intent and meaning of a statute susceptible of different constructions. *Price* v. *Forrest*, 173 U. S. 410, * * *. The manifest declared purpose of the statute was to eradicate from interstate commerce the evils attendant upon low wages and long hours of service in industry. Accepting this as the declared purpose of the Act, exemptions would tend to defeat its purpose. The statute is remedial, with a humanitarian end in view. It is therefore entitled to a liberal construction. *Grier* v. *Kennan*, 8 Cir., 64 F. 2d 605.
>
> We must assume that all employees in interstate commerce so far as reasonably possible, should be made subject to the provisions of the Act. This is emphasized by the title (*United States* v. *Katz*, 271 U. S. 354, * * *) the findings and declaration of policy contained in Section 2, the inclusiveness of the language of Section 6 ("Every Employer"), and of Section 8 (a), reciting that "The objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce," etc. (at p. 56).

The statute seeks to accomplish several specific aims. In the first place, minimum standards of hours and wages were

provided following a long developed policy of Congress to exercise its commerce power to prevent the spread of conditions deleterious to health, efficiency and general welfare. Compare *Virginian Railway Case, supra; United States* v. *Lowden*, 308 U. S. 225, 234; *Brooks* v. *United States*, 267 U. S. 432, 436; *Hipolite Egg Co.* v. *United States*, 220 U.S. 45. Secondly, Congress, recognizing here as it recognized in the National Labor Relations Act that substandard labor conditions lead to strikes and other obstructions of the free flow of goods in commerce, sought to prevent such interruptions by eliminating their causes at the very source. See *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1; *Santa Cruz Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453. Congress sought also to assure the orderly and fair marketing of goods in interstate commerce (cf. *Mulford* v. *Smith*, 307 U. S. 38, and *Currin* v. *Wallace*, 306 U. S. 1) and finally, to prevent wage cutting and other unfair methods of competition, Cf. *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304, *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245.

For the effective accomplishment of these purposes, the Fair Labor Standards Act must be given the broad construction referred to by the court in the *Hawkeye* case. That construction is no more than the necessities of the problems regulated require. Because modern competition among the wholesalers is no respecter of state boundaries and because substandard labor conditions in any one area affect a much larger region and obstruct the channels of interstate commerce through several states, a restrictive construction would defeat the purposes of the Act.

[9] In a recent decision in an employee's suit for wages due

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[9] The Supreme Court recently observed: "* * * *the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing.* The merest glance at state and

under the Fair Labor Standards Act (*Wood* v. *Central Sand and Gravel Co.*, 33 F. Supp. 40 (D. C. W. D., Tenn., 1940) the court said:

> To accomplish the beneficent purposes of the Act, Congress manifestly intended and expected the courts to apply broadly and liberally the coverage of the Act • • • The legislative history of the Act supports this view, and it would be plainly defeating the clear intention of Congress should the courts limit the applicability of the Act by restrictive judicial contraction of interstate commerce (at p. 43).

In the distribution of food products, the forces of competition rage with particular intensity. A large number of wholesale grocers occupy the field, marketing identical or very similar products. Profits are made from quantity sales at rapid turnover; the profit on each individual item is small. The principal cost factor in wholesale operations is that of labor. Consequently, a lowering of wage levels in a wholesale establishment results in the ability to lower prices; a lowering of prices almost inevitably brings increased business to the wage-cutter—to the corresponding detriment of wholesalers whose wage rates have been maintained. In this direct fashion are the evils of unfair labor standards communicated to an entire competitive area overlapping many state lines.

Respondent is in direct competition with out-of-state concerns selling directly to retailers and with wholesalers marketing across state lines. The employees of these distributors are admittedly covered by the provisions of the Fair Labor Standards Act and if the Act did not likewise cover the employees of the respondent, it is manifest that

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federal legislation on the subject demonstrates the force of the *argument that labor relations are not matters of mere local or private concern.*" (Emphasis supplied). *Thornhill* v. *Alabama*, 310 U. S. 88, 103, See also *Morehead* v. *New York, ex rel. Tripaldo*, 298 U. S. 587, 635.

these competing distributors would be placed at a serious competitive disadvantage. A lowering of wage rates and a raising of hours of work without overtime compensation on the part of respondent could enable them to dominate the business which formerly went to employers complying in full measure with the terms of the law. While it is not claimed that the character of respondent's activities as interstate commerce may be determined simply by the character of the activities of their competitors, it must be reiterated that "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." (*Swift & Co.* v. *United States, supra*). The "practical" construction of an Act such as this requires that it be applied to as many employers and employees in the same competitive class as can reasonably be included within the language used by Congress. Permitting some employees the benefits of the Statute while denying them to others in precisely the same position from a practical economic standpoint will only defeat the purpose to remove from the competitive struggle the cost of maintaining minimum wage and hour standards for labor, and "to eliminate competition which thrived upon low wages and substandard working conditions." See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 504, note 24.

It is clear that the framers of the Fair Labor Standards Act did not intend a restrictive application of the Act. They envisaged so broad an application to all employees in the chain of distribution that where they felt it inadvisable to apply the Act, they inserted express exemptions. Thus, in Section 13 (a) (1) it is provided that the wage and hour requirements "Shall not apply with respect to any employee in a bona fide * * * local retailing capacity." Unless this exemption is to be regarded as having no significance, it must be concluded that Congress exempted such workers at the end of the interstate distributive proc-

ess because Congress believed that otherwise they would be within the scope of the wage and hour provisions of the law. And if such a person—the local store clerk, the department store saleslady, for example—may be "engaged in commerce" within the meaning of the act, *A fortiori* employees of wholesalers in the middle of the distributive chain are also included within that meaning.

This conclusion is borne out by a reading of the legislative debates themselves, an interpretative aid recently employed by the Supreme Court in *United States* v. *American Trucking Association, Inc.*, 60 Sup. Ct. 1059. See also *United States* v. *Dickerson*, 60 Sup. Ct. 1034 (Decided May 27, 1940); *Fleming* v. *Hawkeye Pearl Button Co., supra; Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 198-9. In delivering and explaining the conference report on the final draft of the bill which the Senate subsequently enacted into law as the Fair Labor Standards Act of 1938, Senator Borah pointed out that the conference committee had sought to exercise the full limits of congressional power as to employees engaged in interstate commerce within the principles outlined by Chief Justice Marshall in *Gibbons* v. *Ogden, supra.*[10] Senator Wagner stated in the same discussion that, "my prediction is that the same workers whom the courts have held to be in or directly affecting interstate commerce under the National Labor Relations Act will be regarded as subject to the Federal commerce power under the provisions of the bill which we are now considering.[11]

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[10] 73 Cong. Rec. 9172. The discussion of Senator Borah indicating the intention of the framers of the draft to exercise the congressional power is of particular interest. See 83 Cong. Rec. 9166-9178.

[11] 83 Cong. Rec. 9173. The National Labor Relations Board, as early as February, 1938, asserted jurisdiction over wholesalers similar to defendants. Matter of *West Coast Drug Company*, etc., 5 N. L. R. B. 70. Cf. also *Matter of General Motors Sales Corporation, Parts Division*, (Aug. 26, 1940); *Matter of Union Premier Food Stores*, 10 N. L. R. B. 370.

The application of the law to wholesalers was specifically discussed by the House of Representatives when it considered one of the earlier drafts of the bill which eventually became the Fair Labor Standards Act. An amendment offered by Congressman Coffee to exempt wholesalers of certain agricultural products elicited spirited criticism,[12] and was voted down 145 to 113.[13]

Relying on such unequivocal expressions of Congressional intention, as well as on the numerous decisions of the courts set forth in the earlier part of this brief, the Administrator of the Wage and Hour Division announced soon after the Act went into operation that employees of wholesalers receiving merchandise from outside of the state were to be considered entitled to the wage and hour benefits of the law, regardless of whether the merchandise was resold within or beyond the border of the state in which the employer's business was located. This interpretation was contained in paragraphs 14-16 of the Interpretative Bulletin No. 5, issued by the Wage and Hour Division. In speaking of such interpretations of the Wage and Hour Division, the Supreme Court recently took occasion, in *United States* v. *American Trucking Association, Inc.*, 60 Sup. Ct. 1059 (U. S. May 1940), to remark:

> In any case such interpretations are entitled to great weight. This is peculiarly true where the interpretations involve "Contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." (*Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.)

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[12] 83 Cong. Rec. 7421-7422.

[13] 83 Cong. Rec. 7423.

See also *United States* v. *State of Minnesota*, 113 F. (2d) 770, 774 (C. C. A. 8th).

What has happened in Congress since this Administrative interpretation was adopted by the Wage and Hour Division is no less instructive than the discussions which preceded passage of the Act. On May 11, 1939, an amendment was offered to exempt employees of wholesalers from the overtime provisions of the Act.[14] Again on June 5, 1939, the sponsor of the amendment called it to the attention of the House specifically referring to its application to employees of distributors of food stuffs.[15] This proposed amendment never passed the House.

The next spring, on April 30, 1940, another attempt was made to exempt "employees who are working for wholesale grocers."[16] This amendment, offered as an amendment to the Barden Bill, was defeated when the entire Barden Bill (Proposing a number of amendments) was voted down.[17] The amendment was reintroduced on May 2, 1940, as a floor amendment to the Norton Bill. The following day, when the House was considering further amendments to the Norton Bill, an exemption was proposed for "any employee who is employed in any bona fide wholesale establishment."[18] Both of these proposals were likewise defeated when the House rejected the Norton amendments.[19]

The conclusion to be drawn from these repeated attempts and repeated failures to exclude the employees of wholesalers and distributors from the operation of Sections 6 and

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[14] 84 Cong. Rec. 5474.
[15] 84 Cong. Rec. 6633.
[16] 86 Cong. Rec. 8074.
[17] 86 Cong. Rec. 8086.
[18] 86 Cong. Rec. 8439.
[19] 86 Cong. Rec. 8463.

7 of the Act is that these employees were within the intention of Congress as they are within the letter of those provisions. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 414; *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138, 174 (D. C. E. D. Mo.), aff'd 258 U. S. 451. As the Supreme Court in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 488, recently said with respect to the judicial construction of the Sherman Anti-Trust Act, and the subsequent failure of Congress to change this construction:

> The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute of labor unions has brought forth sharply conflicting views both in the Court and in Congress, and where after the matter has been fully brought to the attention of the people and the Congress, the latter has not seen fit to change the statute.

For the same reasons the refusal of Congress during more than three years of systematic campaigns to amend the provisions of the Fair Labor Standards Act, and its failure to pass any of the three specific bills exempting employees of wholesalers in the position of petitioner's employees, must be considered an implicit recognition of the correctness of the Administrative interpretations. Giving that interpretation the "great weight" which the Supreme Court has said that it deserves, it is respectfully submitted that respondent's employees are entitled to the wage and hour benefits of the Act.

C.

Regulation of the Wages and Hours of Respondent's Employee Was Unquestionably Within the Constitutional Power of Congress.

We have shown in the preceding sections of the argument that respondent's employee was "engaged in Commerce among the several states," according to the rulings of the courts and within the clear intent of Congress. The power of Congress to prescribe standards of wages and hours of employees engaged in interstate commerce has been repeatedly sustained. *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612; *Wilson v. New*, 243 U. S. 332; Cf. *Patterson v. Mark Eudora*, 190 U. S. 169. Numerous decisions under the Fair Labor Standards Act itself uphold the constitutionality of the wage and hour provisions of Sections 6 and 7 of the Act.[20]

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[20] In *United States v. Darby Lumber Co.*, 61 S. Ct., 451, Mr. Justice Stone (now Chief Justice) said:

> The power of Congress over interstate commerce is *not* confined to the regulation of commerce among the states. It extends to those activities intrastate which so *affect* interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.
>
> Footnote: It may prohibit wholly intrastate activities, which, if permitted, would result in restraint of interstate commerce.
>
> Congress has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any shipper or producer.

Nor can any tenable constitutional objection be made to the application of these regulations to employees engaged in the type of activities here involved. The cases most closely in point conclusively establish that the activities of respondent's employee constitute interstate commerce. (See cases discussed in Section A of this brief.) Indeed the constitutional power of Congress over commerce has been held to cover a much broader scope of activity than is here involved. (Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board, supra; Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38; *Virginian Ry.* v. *Federation System, No. 40*, 300 U. S. 515; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381). It has long been recognized that activities which admittedly are not part of interstate commerce can be regulated by Congress where such regulation is necessary for effective control of interstate transactions. (Cf. *Shreveport* case, 234 U. S. 342, 351, 352; *The Minnesota Rate* cases, 230 U. S. 352, 339; *United States* v. *Rock Royal Co. Op., Inc.*, 307 U. S. 533, 568). *A fortiori* the activities of employees who are actually engaged in interstate commerce are clearly subject to the regulatory power of Congress under the commerce clause of the Constitution.

Conclusion.

Petitioner and respondent were "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act from October 24, 1938 to July 24, 1940. The respondent has failed to pay petitioner the minimum wage and overtime compensation required by the Act; it has failed to keep the records required by the Act; respondent thus has violated Sections 6 and 7 of the Act. It is respectfully submitted, therefore, that petitioner is entitled

to recover his unpaid minimum wages and unpaid overtime compensation, not only for the period from October 24, 1938 to January 1, 1939, but also for the period from January 1, 1939, to July 24, 1940.

Respectfully submitted,

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In The Supreme Court of The United States

OCTOBER TERM, 1941

No. [redacted] 97

ANSEL HIGGINS,

Petitioner,

Versus

CARR BROTHERS COMPANY, INC.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

JAMES R. DESMOND,
HON. CLEMENT F. ROBINSON,
FRANCIS W. SULLIVAN,
Counsel for Respondents.

Marks Printing House, Portland, Me.

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In The Supreme Court of The United States

Docket No. 1552 **October Term A. D. 1941**

ANSEL HIGGINS,
Petitioner,

vs.

CARR BROTHERS COMPANY, INC.,
Respondent.

Petition for Writ of Certiorari to
Supreme Judicial Court of Maine.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

NARRATION

Ansel Higgins, Plaintiff, was a night man and shipper in the employ of Carr Brothers Company, Defendant, from October 24, 1938, to April 1, 1939 (p. 68). He was driver of a truck for the Defendant, locally and entirely in the State of Maine from April 1, 1939, to July 24, 1940 (p. 69). He was paid a fixed salary of $16.00 per week (p. 67). He never drove a truck across a state line, nor did he ship anything out of the State of Maine save for the period from October

24, 1938, to January 1, 1939 (p. 70). He never delivered merchandise to a carrier for out of state shipment (p. 70).

Carr Brothers Company is a Maine corporation with its only place of business at Portland (p. 81). During the period in controversy, it shipped no goods out of the state, sold no goods out of the state, and sold no merchandise to be carried out of the state with the exception of the Berlin, New Hampshire, trip, which it maintained from October 24, 1938, until January 1, 1939 (p. 50, 87, 89), and with the exception of a $1.50 order and merchandise valued at some $75.00 (p. 99, 100), which were sold to two individuals at Portland, Maine, and presumably carried out of the State to New Hampshire by them.

The Defendant did not engage in brokerage (p. 95). It has always purchased its goods, warehoused them and owned them before it has sold or taken orders for sale (p. 95). It has never ordered goods from out of the state to be shipped directly to the customer (p. 85). It has never taken orders prior to the purchase of merchandise. It has acquired no goods from out of the state to be halted temporarily at the warehouse and then forwarded to customers outside of the State of Maine.

The Defendant did a gross volume of business of $450,000 to $500,000 a year (p. 100). 50% of its volume was in produce raised and sold by farmers to the Defendant in the State of Maine (p. 98). The rest of its merchandise came from places outside the State of Maine (p. 82). Much of its merchandise consisted of citrus fruit from Florida a few months of the year and from California during twelve months of the year (p. 93). As to the citrus fruit from Florida and California, the Defendant had and exercised a right of inspection before buying (p. 98). The Defendant enjoyed the same right of inspection as to potatoes purchased outside of the State of Maine (p. 97).

Bananas, which were a large item, came from out of the State of Maine without a right of inspection and after arriving at the Defendant's place of business were broken up and sold in broken lots after being processed (p. 98). Most of the citrus fruit, with the exception of lemons, was sold in the original package (p. 93).

The defendant purchased some of its produce through a broker in Boston, to whom it paid a commission (p. 97). Some of the goods were purchased in car lots by the Defendant directly from various parts of the country (p. 98). The Defendant conducted a purely wholesale business.

ARGUMENT

The issue in the instant case is whether or not the Defendant from October 24, 1938, to July 24, 1940, was an industry engaged in commerce or in the production of goods for commerce.

For the period from October 24, 1938, to January 1, 1939, the trial Judge has found that the Defendant sustained a sale and delivery of goods from Portland to Berlin, New Hampshire, and that consequently the Defendant was engaged in interstate commerce. The Defendant has no quarrel with that finding, and even if it had such, it is now too late to question it. *Frank* vs. *Mallett*, 92 Maine, 79.

From January 1, 1939, to July 24, 1940, the Defendant with the trifling exceptions amounting to some $76.50 (pp. 99, 100) sold no goods to purchasers outside of Maine, or which ultimately went out of Maine as far as the evidence discloses. During the time from January 1, 1939, to July, 1940, the Plaintiff was a night man and shipper, and latterly, local truck driver, making local deliveries. There is no evidence that his work took him from a terminal to a warehouse. He was engaged in local distribution.

The issue paraphrased is this: Is a wholesaler who, with the exception of an infinitesimal sale of goods in his own state, purchased and carried out of the state by two isolated purchasers, does a purely intrastate wholesale business, within the purview of the Fair Labor Standards Act, if he acquires a considerable portion of his merchandise for sale from out of the State?

Were the court to decide in the affirmative, the control of the Federal Government over business that is purely local would be complete. Were this remote connection with interstate commerce to be considered within the jurisdiction of the national government, it would be extremely difficult to say how far the Federal Government can regulate local business. The interpretative bulletins of the administrators of the Fair Labor Standards Act are a patent attempt at a far reaching enlargement of government control, and if successful will be emphatically subversive of our conceived notions as to local, state autonomy.

The Defendant, if engaged in interstate commerce, was only such in a contemplation of the source of its merchandise and not the distribution of it. Until decided cases of the United States Supreme Court have been entirely discredited, the Defendant was, therefore, engaged purely in intrastate commerce. The interstate commerce terminated at the warehouse of the Defendant.

The Plaintiff, while he was a truck driver, was either engaged in interstate commerce, or he was not. We are clear that he was not. Had he been engaged in interstate commerce as to maximum hours, he was completely within the jurisdiction of the Interstate Commerce Commission and not of the Fair Labor Standards Act. If we are correct that he was not engaged in interstate commerce, he was not within the pale of the Fair Labor Standards Act by either horn of

the dilemma and cannot recover in this action for maximum hours.

The Defendant performed no services as broker. It never sold what it did not own and already have in its warehouse. It negotiated no sales directly from the manufacturer or shipper to its customers. It did not, therefore, promote the stream of commerce. Half of its volume was bought and sold locally from local farmers. The right of inspection as to much of its merchandise, to wit, the citrus fruit, under the terms of the Uniform Sales Act, made the passage of title to the Defendant a State of Maine transaction.

While it is true that for the convenience of local purchasers most of the oranges and grapefruit, and practically all of the potatoes were sold in the original packages, nevertheless, the stream of commerce had ended and the original package doctrine under the decisions cannot prevail. *Brown* v. *Bailey*, the decision of the Supreme Court of Tennessee hereinafter cited, is on all fours with the instant case with reference to the original package doctrine.

The bulwark of defense in this case and in similar cases will be the now famous Schechter case of the United States Supreme Court, which still stands in full force and vigor. Until that case has been completely discredited, the Plaintiff cannot successfully prosecute the issue here. Later cases of the United States Supreme Court which are cited herein with the Schechter case, to wit, *Jones* v. *McLaughlin* and *Carter* v. *Carter Coal Company*, have held that where there is a close and substantial relation to interstate commerce, the government may regulate at the source to protect that commerce from burdens and obstructions. Yet, the last two cases assume that there is interstate commerce and in the instant case, the Schechter case has definitely adjudicated that interstate commerce has ended before the Defendant has distributed its goods. The Schechter case is a stubborn fact.

LAW

The Fair Labor Standards Act of 1938

Title 29, U. S. C. A. in section 202 defines industries covered as follows:

. . . "industries engaged in commerce . . . in the production of goods for commerce.".

Commerce is defined in section 203

"(b) 'Commerce' means trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof."

(All of the Defendant's merchandise was purchased locally or finally landed from interstate shipment at a dead end street, to wit, Carr Brothers, Inc. warehouse.)

Minimum wages (sec. 208) are

(1) No less than 25c per hour during first year from effective date.

(2) No less than 30c per hour during next six years.

Maximum hours are (sec. 207)

(1) No more than 44 hours first year.

(2) No more than 42 hours second year.

Exemptions of Employees (sec. 213)

"(b) The provisions of section 207 shall not apply with respect to (1) any employee with respect to whom the Inter-

state Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or (2) any employee of an employer subject to the provisions of Part 1 of the Interstate Commerce Act."

Section 304 of Title 49 "Motor Carrier Act (new) 1935" is as follows:

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of sections 304 (d) and (e), 305, 320, 321, 322 (a), (b), (d), (f) and (g), and 324 of this chapter."

Section 303 of Title 49 "Motor Carrier Act (New) 1935" defines "private carrier":

"(a) (17) The term 'private carrier' of property by motor vehicle means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

Bechtel v. *Stillwater Milling Co.*, 33 Fed. Supp. 1010.

Schechter v. U. S., 295 U. S. 495

@ 520 "The defendants are slaughterhouse operators of the latter class '(marketmen)'. A. L. A. Schechter Poultry

Corporation and Schechter Live Poultry Market are corporations conducting wholesale poultry slaughterhouse markets in Brooklyn, New York City. Joseph Schechter operated the latter corporation and also guaranteed the credits of the former corporation, which was operated by Martin, Alex and Aaron Schechter. Defendants ordinarily purchase their live poultry from commission men at the West Washington Market in New York City or at the terminals serving the city, but occasionally they purchase from commission men in Philadelphia. They buy the poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets in Brooklyn, it is resold, usually within twenty-four hours, to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendants is immediately slaughtered, prior to delivery by schochtim in defendant's employ. Defendants do not sell poultry in interstate commerce."

@ 542 "Were these transactions 'in' interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other states. But the code provisions, as here applied, do not concern the transportation of the poultry from other states to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at West Washington Market in New York City or at the railroad terminals serving the city, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce." . . .

"The indisputed facts thus afford no warrant for the ar-

gument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use. So far as the poultry herein questioned is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the state. It was not held, used or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states. Hence decisions which deal with a stream of interstate commerce—where goods come to rest within a state temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here." . . .

@ 545 . . . "But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control." . . .

Jones v. *McLaughlin*, 301 U. S. 1.

This was a case of the National Labor Relations Board, and the court held that where you have interstate commerce, national control is essential or appropriate to protect that commerce from burdens and obstructions.

The Federal Wages and Hours Act

Harvard Law Review, Vol. 52, Page 646, @ Page 652. "Where a wholesaler or distributor ships goods outside the state, it seems apparent that he is 'engaged in commerce'. But only those of his employees occupied in loading or trucking are clearly so engaged. As to the others the problem is similar to that of 'back shop' railroad employees. Where the wholesaler or distributor imports goods for local distribution, the nature of the intermediate stoppage becomes important. If the goods are shipped to him, warehoused, and subsequently sold from the warehouse, it seems quite clear that, under existing authorities, the interstate movement has ended and that he is engaged in a purely local activity. Only those employees engaged in the actual unloading process are engaged in commerce, and even as to them a prolonged delay renders the Act unapplicable. If the goods are so resold that the continuity of the shipment is not broken, however, resort may be had to the 'flow of commerce cases' " . . .

Attention of the court is invited to the voluminous and learned foot notes 53 through 58 accompanying the above text and especially note 55 which declares that *Schechter* vs. *United States* cited supra is very much in point in the instant case although the Administrator of the Wage and Hour Division under the Fair Labor Standards Act "appears to minimize if not to ignore the apparent continued validity of this case."

Note 55 is in full as follows:

"*Atlantic Coast Line R. R.* v. *Standard Oil Co. of Ky.*, 275 U. S. 257 (1927); *Hartford Accident & Indemnity Co.* v. *Illinois ex rel. McLaughlin*, 298 U. S. 155 (1926); *Winslow* v. *Fed. Trade Comm.*, 277 Fed. 206 (C. C. A. 4th, 1921), cert. denied, 258 U. S. 618 (1922); *Jell-O* v. *Landes*, 20 F. (2d)

120 (C. C. A. 9th, 1927); *Southern Pac. Co.* v. *Van Hoosear*, 72 F. (2d) 903 (C. C. A. 9th, 1924); *United States* vs. *Rogles*, 9 F. Supp. 857 (E. D. Mo. 1935); *United States* v. *French*, 10 F. Supp. 674 (E. D. Mich. 1935) (NRA); *Fleischmann Co.* v. *Conway*, 166 La. 547; 122 S. 845 (1929). This was substantially the factual situation in *A. L. A. Schechter Poultry Corp.* v. *United States*, 295, U. S. 495 (1935). The Administrator appears to minimize if not to ignore the apparent continued validity of this case. See Interpretative Bulletin No. 5 (16). But see Questions and Answers No. 5."

Brown v. *Bailey*, 147 Southwestern 2nd 105, decided February 3, 1941; also cited *Commerce Clearing House*, paragraph 60256. In this case defendant employer was a wholesale liquor distributor in Tennessee with a warehouse and business in the City of Chattanooga. It sold whiskey to dealers in Tennessee partly in broken packages and partly in the original package which had come from outside the state. The plaintiff employee was the night watchman at the warehouse. The defense was that the liquor came to rest at the warehouse in Chattanooga and thereafter was in intrastate commerce.

The court held that in spite of the sale in part of the product in the original containers, interstate commerce stopped in the warehouse of the defendant. A point was made of the fact that the defendant did no brokerage and therefore took no part in the stream of commerce.

Atlantic Coast Line Railroad Co. vs. *Standard Oil Co.*, 275 U. S. 257. Oil was brought by boat from Louisiana and Mexico to the plaintiff company in Florida. It was pumped to the tanks at Florida of the plaintiff. The plaintiff distributed and sold the oil in Florida. The United States Supreme Court held that this was intrastate commerce.

Laurence Baggett vs. *Henry Fischer Packing Company*, United States District Court, Western District of Kentucky, February 24, 1941, Commerce Clearing House, paragraph 60298.

The court held on motion that for an employee to come within the provisions of the Fair Labor Standards Act, he must allege and prove that he was engaged in commerce or in the production of goods for commerce; that it was not enough that the employer was.

Abadie vs. *Cudahy Packing Co. of La.*, United States District Court of La., Commerce Clearing House, paragraph 60314.

While the Plaintiff was engaged as a local truck driver, as to maximum hours, as we have said before, he was under the Interstate Commerce Commission.

Gibson vs. *Wilson & Co.*, United States District Court, Tenn., March 20, 1941, Commerce Clearing House, 60466.

As a local truck driver, the work of the Plaintiff was so remote as in no event to be part of the stream of commerce.

Rivera vs. *Central Augirre Sugar Co.*, U. S. District Court, Porto Rico, April 24, 1941.

Fleming, Administrator vs. *McGehee*, U. S. District Court, Fla., July 23, 1941, Commerce Clearing House, 60614.

The last case says, "That it is the business that the employee is engaged in rather than the business of the employer that determines whether the employee is under the Act or not." The same case holds that sales outside the state that are few and inconsequential compared to the Defendants' volume are of no effect. That the merchant must make substantial sales in interstate commerce to come within the Act.

See also:

Swift & Co. vs. *Welkerson*, Circuit Court of Appeals, 5th District, December 10, 1941, Commerce Clearing House, 60818.

Moses vs. *McKesson & Robbins, Inc.*, District Court, Southern District, Texas, February 20, 1942, Commerce Clearing House, 60952.

Hooks vs. *Nashville Breeko Block & Tile Co.*, U. S. District Court, Tenn., July 7, 1941, Commerce Clearing House, 60620.

This case held that a company engaged in the manufacture and sale of cinder blocks for building is not engaged in interstate commerce within the meaning of the Act, where 98½% of its sales are intrastate.

Gerdert, et als. vs. *Certified Poultry & Egg Co., et al.*, U. S. District Court, Fla., April 29, 1941, Commerce Clearing House, 60479.

This case found that a wholesaler who purchased goods from outside the state and to whom the goods were delivered in interstate commerce by interstate transportation, who took the goods shipped from the interstate carrier and placed them in his store or warehouse, and who later sold them locally, was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act. The court further held that isolated transactions in interstate commerce, not a part of the usual course of business, do not bring a wholesaler within the provisions of the Act. The decision said that such would be true even if the Act undertook to regulate such transactions as being a practice that injuriously affected interstate commerce or the free flow of goods in commerce.

Fleming, Administrator vs. *Belo Corp.*, U. S. Circuit Court of Appeals, 5th Circuit, June 27, 1941, Commerce Clearing House, 60569.

This case held that the interpretative bulletins of the Administrator are not binding or necessarily persuasive upon the courts.

H. W. Lamb vs. *Quality Bakery Co.*, Tenn. Court of Appeals, August 10, 1941, Commerce Clearing House, 60084.

In this case plaintiff was a baker. 99% of product sold in the state. 1% shipped outside the state. Approximately four shipments of some 50 to 100 lbs. each were made weekly to places, two or three in number, in other states. The court held that the interstate shipments were too inconsequential to make the provisions of the Act applicable. The Department bulletin of the Administrator was discredited because of the lack of any court decision.

Much capital will, no doubt, be made by the plaintiff of the case of *Fleming, Administrator,* vs. *Alterman Brothers,* U. S. District Court for the Northern District of Georgia, March 31, 1941, Commerce Clearing House, 60389, 38 Fed. Supp., 94. I am informed that in the Alterman Brothers case the learned Judge completely adopted the brief of the Wage and Hour Division. The case ignores the Schechter decision and other authorities collected in the Harvard Law Review, reference cited above. In spite of the broad dicta in the opinion, there are several facts which essentially distinguish the Alterman Brothers case from the instant case. In the Alterman case, 99½% of the goods sold by the employer originated outside of Georgia. A great deal of the merchandise was packed in Indiana and in California and labeled "Packed for Alterman Brothers." All of the merchandise was bought and sold, in the Alterman case, outside of the State of Georgia, where title passed. Practically all of the merchandise sold in Georgia was sold in original packages. Almost all orders were for future delivery. Goods were ordered to meet anticipated future deliveries, and the tempo of buying and selling was accelerated so much that the Judge found a pretext for visualizing a stream of commerce. Goods were kept on hand only to meet constantly recurring orders. Very frequently orders were taken prior to a purchase by the employer to fill the orders. Such never happened in the instant case. Much of the Alterman Brothers business was obtained through bids and long term contracts specifying the

size and kind of the product. Many were drop shipments, were made directly from the manufacturer to Alterman Brothers' customers. Such was pure brokerage, a practice which Carr Brothers never participated in. The Judge observes that some of Alterman Brothers' goods never stopped in their warehouse.

Reference is made to REVISED STATUTES OF MAINE FOR 1930, CHAPTER 165, SECTIONS 47 and 48, UNIFORM SALES ACT.

Recent cases in support of the employer-defendant-respondent contentions above are:

Isbell, Jr., vs. *V. W. Wood & Co.*, Alabama Intermediate Civil Court of Birmingham, April 30, 1941, Commerce Clearing House, 60723.

Jehs vs. *Singer Sewing Machine Co.*, District Court, Oklahoma, October 16, 1941, Commerce Clearing House, 60760.

Sybert vs. *Bradley et als.*, District Court, Southern District, Illinois, September 29, 1941, Commerce Clearing House, 60769.

Ranhoff et al. vs. *Gramling & Co.*, District Court, Eastern District of Arkansas, August 22, 1941, Commerce Clearing House, 60822.

White Motor Co. vs. *Littleton et al.*, Circuit Court of Appeals, 5th Circuit, December 12, 1941, Commerce Clearing House, 60825.

Respectfully submitted,

JAMES R. DESMOND,
HON. CLEMENT F. ROBINSON,
FRANCIS W. SULLIVAN,
Attorneys for Respondent.

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In The Supreme Court of The United States

OCTOBER TERM, 1942

No. 97

ANSEL HIGGINS

vs.

CARR BROTHERS COMPANY, Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MAINE

BRIEF FOR RESPONDENT

JAMES R. DESMOND,
HON. CLEMENT F. ROBINSON,
FRANCIS W. SULLIVAN,
Counsel for Respondents.

Marks Printing House, Portland, Me.

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In The Supreme Court of The United States

Docket No. 97 **October Term, A. D. 1942**

ANSEL HIGGINS, Petitioner,

vs.

CARR BROTHERS COMPANY, INC., Respondent

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

BRIEF FOR CARR BROTHERS COMPANY, RESPONDENT

NARRATION

Ansel Higgins, Petitioner, was a night man and shipper (pp. 1, 7, Transcript of Record) in the employ of Carr Brothers Company, Respondent, from October 24, 1938, to April 1, 1939 (p. 1). He was driver of a truck for the Defendant, locally and entirely in the State of Maine from April 1, 1939, to July 24, 1940 (p. 1). He never drove a truck across a state line, nor did he ship anything out of the State of Maine save for the period from October 24, 1938, to January 1, 1939 (pp. 1, 7 and 8). He never delivered merchandise to a carrier for out of state shipment, unloaded from a carrier or hauled from a terminal to a warehouse.

The work of the Petitioner from January 1, 1939, to July 24, 1940, is the subject matter of the present controversy (pp. 2 and 7).

Carr Brothers Company is a Maine Corporation with its only place of business in Portland (p. 6). During the period in dispute, it shipped no goods out of Maine, sold no goods out of Maine and sold no goods to be carried out of Maine (pp. 1, 2, 6, 8).

The Respondent did not engage in brokerage (pp. 1, 6). It has always purchased its goods, warehoused them and owned them before it has sold them or taken orders for sale (p. 6). It has never ordered goods from out of the State of Maine to be shipped directly to the consumer (p. 6). It has never taken orders prior to purchase by it of the merchandise (p.6). It has acquired no goods from out of the state to be halted temporarily at the warehouse and then forwarded to customers outside the State of Maine (p. 6).

Some of Respondent's merchandise was bought by it from local producers and some was bought by it from dealers in other states (pp. 1 and 6). The business was fruit, grocery and produce (pp. 1 and 6). Some of the produce and fruit was processed by the Respondent (pp. 1 and 6). Much of it was sold in the condition in which it was received (p. 6).

ARGUMENT

The issue in the instant case is whether or not the Respondent from January 1, 1939, to July 24, 1940, was an industry engaged in commerce or in the production of goods for commerce.

For the period from October 24, 1938, to January 1, 1939, the trial Judge has found that the Respondent sustained a sale and delivery of goods from Portland to Berlin, New Hampshire, and that consequently the Respondent was engaged in interstate commerce. The Respondent has no quarrel with that finding, and even if it had such, it is now too late to question it. *Frank* v. *Mallett*, 92 Maine, 79.

From January 1, 1939, to July 24, 1940, the Respondent (pp. 2 and 6) sold no goods to purchasers outside of Maine, or which ultimately went out of Maine as far as the record discloses. During the time from January 1, 1939, to July, 1940, the Petitioner was a night man and shipper, and latterly, local truck driver, making local deliveries. There is no evidence that his work took him from a terminal to a warehouse. He was engaged in local distribution (pp. 2 and 7).

The issue paraphrased is this: Is a wholesaler who does a purely intrastate wholesale business, within the purview of the Fair Labor Standards Act if he acquires a considerable portion of his merchandise for sale from out of the State?

Were the court to decide in the affirmative, the control of the Federal Government over business that is purely local would be complete. Were this remote aftermath of interstate commerce to be considered within the jurisdiction of the national government, it would be extremely difficult to say how far the Federal Government can regulate local business. The interpretative bulletins of the administrators of the Fair Labor Standards Act are a patent attempt at a far reaching enlargement of government control, and if successful will be emphatically subversive of our conceived notions as to local, state autonomy.

The Respondent, if engaged in interstate commerce, was only such in a contemplation of the source of its merchandise and not the distribution of it. Until decided cases of the United States Supreme Court have been entirely discredited, the Respondent was, therefore, engaged purely in intrastate commerce. The interstate commerce terminated at the warehouse of the Respondent.

The Respondent performed no services as broker. It never sold what it did not own and already have in its warehouse. It negotiated no sales directly from the manufacturer or shipper to its own customers. It did not, therefore, promote the stream of commerce. Half of its volume was bought from local producers and sold locally.

While it is true that some of the merchandise was sold in the original packages, nevertheless, the stream of commerce had ended and the original package doctrine under the decisions cannot prevail. *Brown* v. *Bailey*, the decision of the Supreme Court of Tennessee hereinafter cited, is on all fours with the instant case with reference to the original package doctrine.

The bulwark of defense in this case and in similar cases will be the now famous Schechter case of the United States Supreme Court, which still stands in full force and vigor. Until that case has been completely discredited, the Plaintiff cannot successfully prosecute the issue here. The Schechter case is a stubborn fact.

LAW

The Fair Labor Standards Act of 1938

Title 29, U. S. C. A. in section 202 defines industries covered as follows:

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"(b) 'Commerce' means trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof."

(All of the Defendant's merchandise was purchased locally or finally landed from interstate shipment at a dead end street, to wit, Carr Brothers, Inc. warehouse.)

Schechter v. U. S., 295 U. S. 495

@ 520 "The defendants are slaughterhouse operators of the latter class '(marketmen)'. A. L. A. Schechter Poultry Corporation and Schechter Live Poultry Market are corporations conducting wholesale poultry slaughterhouse markets in Brooklyn, New York City. Joseph Schechter operated the

latter corporation and also guaranteed the credits of the former corporation, which was operated by Martin, Alex and Aaron Schechter. Defendants ordinarily purchase their live poultry from commission men at the West Washington Market in New York City or at the terminals serving the city, but occasionally they purchase from commission men in Philadelphia. They buy the poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets in Brooklyn, it is resold, usually within twenty-four hours, to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendants is immediately slaughtered, prior to delivery by schochtim in defendant's employ. Defendants do not sell poultry in interstate commerce."

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"The indisputed facts thus afford no warrant for the argument that the poultry handled by the defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow con-

tinues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use. So far as the poultry herein questioned is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the state. It was not held, used or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states. Hence decisions which deal with a stream of intery state commerce—where goods come to rest within a state temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here."—

@ 545—"But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control."—

Jones v. *McLaughlin*, 301 U. S. 1.

This was a case decided under the National Labor Relations Act and held that the Federal Government enjoys the power to regulate the relation as such of employer and employee in production or manufacture in order to protect interstate commerce although the source of the danger to interstate commerce be remote. There were four dissents to the majority opinion which reversed a Circuit Court decision. The court, however, conserved the distinction between intrastate and interstate commerce in these words:

> "The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which

> the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system.'

Jones vs. *McLaughlin* may be readily distinguished from the case at bar by two essential differences. In that case the Court found the veritable existence of interstate commerce. In the instant case, interstate commerce ended with the arrival of Respondent's merchandise at the local warehouse. In that case the National Labor Relations Act was under interpretation, 29 U. S. C. A., Sec. 151 ff.

The National Labor Relations Act contains the term or element "affecting commerce" and defines it as follows:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstruction commerce or the free flow of commerce."

The Fair Labor Standards Act follows the pattern of the Labor Relations Act but is abruptly halted to apply only to employees "engaged in commerce or in the production of goods for commerce." It does not control relations "affecting commerce." Indeed the legislative history of the Fair Labor Standards Act reveals that the House by amendment broadened the coverage to include "employer engaged in commerce in an industry affecting commerce" (H. Rep. No. 2182, 75th Cong., 3d Sess., p. 283, Cong. Rec. 7749 ff) but that in the conference committee the Senate refused to accept the House amendment and the conference draft of the bill enacted into law restored the norm of coverage contained in the original Senate bill (H. Rep. No. 2738, 75 Cong., 3d Sess, p. 29 ff; 83 Cong. Rec. 9158, 9266, 9267).

Senator Pepper of the Conference Committee in discussing the bill before the Senate and in reply to an objection to the broad scope of the act, said:

"I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the Committee."

So much for the old law, the mischief and the remedy. The "stream of commerce" theory is precluded in the instant case. Assuming that contrary to the Schechter case Congress could legislate as to the relation of the Petitioner with the Respondent under the facts of the case at bar, Congress did not include the present situation in the letter or intent of the Fair Labor Standards Act.

Jewel Tea Co. v. *Williams*, 118 Fed (2d) 202.

"The act by its terms is limited to employees engaged in interstate commerce for the production of goods for interstate commerce. It does not extend to employment that merely affects interstate commerce. If there could be doubt as to the correctness of this interpretation it is set at rest by the legislative history of the act. —Where goods are ordered and shipped in interstate commerce to meet the anticipated demands of customers without a specific order therefor from a customer and the goods come to rest in a warehouse the interstate commerce ceases when the goods come to rest in a state. It does not continue until the demand eventuates in the form of an order and the merchandise is delivered to the retailer. The mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce."

Even in cases, unlike the present case, where interstate commerce exists or will later be and has not ended as here "a close and substantial relation to interstate commerce" is required to justify control.

Santa Cruz Fruit Packing Co. v. *National Labor Relations Board*, 303 U. S., 453.

The Federal Wages and Hours Act

Harvard Law Review, Vol. 52, Page 646, @ Page 652. "Where a wholesaler or distributor ships goods outside the state, it seems apparent that he is 'engaged in commerce.' But only those of his employees occupied in loading or trucking are clearly so engaged. As to the others the problem is similar to that of 'back shop' railroad employees. Where the wholesaler or distributor imports goods for local distribution, the nature of the intermediate stoppage becomes important. If the goods are shipped to him, warehoused, and subsequently sold from the warehouse, it seems quite clear that, under existing authorities, the interstate movement has ended and that he is engaged in a purely local activity. Only those employees engaged in the actual unloading process are engaged in commerce, and even as to them a prolonged delay renders the Act unapplicable. If the goods are so resold that the continuity of the shipment is not broken, however, resort may be had to the 'flow of commerce cases'."—

Attention of the court is invited to the voluminous and learned footnotes 53 through 58 accompanying the above text and especially note 55 which declares that *Schechter* vs. United States cited supra is very much in point in the instant case although the Administrator of the Wage and Hour Division under the Fair Labor Standards Act "appears to minimize if not to ignore the apparent continued validity of this case."

Brown v. *Bailey,* 147 Southwestern 2nd 105, decided February 3, 1941, also cited Commerce Clearing House, paragraph 60256. In this case defendant employer was a wholesale liquor distributor in Tennessee with a warehouse and business in the City of Chattanooga. It sold whiskey which had come from outside the state, to dealers in Tennessee, partly in broken packages and partly in the original package. The plaintiff employee was the night watchman at the warehouse. The defense was that the liquor came to rest at

the warehouse in Chattanooga and thereafter was in intrastate commerce.

The court held that in spite of the sale in part of the product in the original containers, interstate commerce stopped in the warehouse of the defendant. A point was made of the fact that the defendant did no brokerage and therefore took no part in the stream of commerce.

Atlantic Coast Line Railroad Co. vs. *Standard Oil Co.*, 275 U. S. 257. Oil was brought by boat from Louisiana and Mexico to the plaintiff company in Florida. It was pumped to the tanks at Florida of the plaintiff. The plaintiff distributed and sold the oil in Florida. The United States Supreme Court held that this was intrastate commerce.

Laurence Baggett vs. *Henry Fischer Packing Company*, United States District Court, Western District of Kentucky, February 24, 1941, Commerce Clearing House, paragraph 60298.

The court held on motion that for an employee to come within the provisions of the Fair Labor Standards Act, he must allege and prove that he was engaged in commerce or in the production of goods for commerce; that it was not enough that the employer was.

Abadie vs. *Cudahy Packing Co. of La.*, United States District Court of La., Commerce Clearing House, paragraph 60314.

As a local truck driver, the work of the Plaintiff was so remote as in no event to be part of the stream or commerce.

Rivera vs. *Central Augirre Sugar Co.*, U. S. District Court, Porto Rico, April 21, 1941.

Fleming, Administrator vs. *McGehee*, U. S. District Court, Fla., July 23, 1941, Commerce Clearing House, 60614.

The last case says, "That it is the business that the employee is engaged in rather than the business of the employer that determines whether the employee is under the Act or

not." The same case holds that sales outside the state that are few and inconsequential compared to the Defendants' volume are of no effect. That the merchant must make substantial sales in interstate commerce to come within the Act.

See also:

Swift & Co. vs. *Welkerson,* Circuit Court of Appeals, 5th District, December 10, 1941, Commerce Clearing House, 60818.

Moses vs. *McKesson & Robbins, Inc.,* District Court, Southern District, Texas, February 20, 1942, Commerce Clearing House, 60952.

Hooks vs. *Nashville Breeko Block Tile Co.,* U. S. District Court, Tenn., July 7, 1941, Commerce Clearing House, 60620.

The case next above held that a company engaged in the manufacture and sale of cinder blocks for building is not engaged in interstate commerce within the meaning of the Act, where 98½% of its sales are intrastate.

Gerdert, et als. vs. *Certified Poultry & Egg Co., et al.,* U. S. District Court, Fla., April 29, 1941, Commerce Clearing House, 60479.

This case found that a wholesaler who purchased goods from outside the state and to whom the goods were delivered in interstate commerce by interstate transportation, who took the goods shipped from the interstate carrier and placed them in his store or warehouse, and who later sold them locally, was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act. The court further held that isolated transactions in interstate commerce, not a part of the usual course of business, do not bring a wholesaler within the provisions of the Act. The decision said that such would be true even if the Act undertook to regulate such transactions as being a practice that injuriously affected interstate commerce or the free flow of goods in commerce.

Fleming, Administrator vs. *Belo Corp.*, U. S. Circuit Court of Appeals, 5th Circuit, June 27, 1941, Commerce Clearing House, 60569.

This case held that the interpretative bulletins of the Administrator are not binding or necessarily persuasive upon the courts.

H. W. Lamb vs. *Quality Bakery Co.*, Tenn. Court of Appeals, August 10, 1941, Commerce Clearing House, 60084.

In this case plaintiff was a baker. 99% of the product were sold in the state. 1% was shipped outside the state. Approximately four shipments of some 50 to 100 lbs. each were made weekly to places, two or three in number, in other states. The court held that the interstate shipments were too inconsequential to make the provisions of the Act applicable. The Department bulletin of the Administrator was discredited because of the lack of any court decision.

Capital has been made by the plaintiff of the case of *Fleming, Administrator* vs. *Alterman Brothers*, U. S. District Court for the Northern District of Georgia, March 31, 1941, Commerce Clearing House, 60389, 38 Fed. Supp., 94 (page 25, footnote; Petitioner's Brief). I am informed that in the Alterman Brothers case the learned Judge completely adopted the brief of the Wage and Hour Division. The case ignores the Schechter decision and other authorities collected in the *Harvard Law Review*, reference cited above. In spite of the broad dicta in the opinion, there are several facts which essentially distinguish the Alterman Brothers case from the instant case. In the Alterman case, 99½% of the goods sold by the employer originated outside of Georgia. A great deal of the merchandise was packed in Indiana and in California and labeled "Packed for Alterman Brothers." All of the merchandise was bought by and sold to the Alterman Brothers outside of the State of Georgia, where title passed. Practically all of the merchandise sold in Georgia was sold in original packages. Almost all orders were for future de-

livery. Goods were ordered to meet anticipated future deliveries, and the tempo of buying and selling was accelerated so much that the Judge found a pretext for visualizing a stream of commerce. Goods were kept on hand only to meet constantly recurring orders. Very frequently orders were taken prior to a purchase by the employer to fill the orders. Such never happened in the instant case. Much of the Alterman Brothers business was obtained through bids and long term contracts specifying the size and kind of the product. Many were drop shipments, were made directly from the manufacturer to Alterman Brothers' customers. Such was pure brokerage, a practice in which Carr Brothers never participated. The Judge observes that some of Alterman Brothers' goods never stopped in their warehouse.

> *Ranhoff, et al.* vs. *Gramling & Co.*, District Court, Eastern District of Arkansas, August 22, 1941, Commerce Clearing House, PP 60822.

The foregoing case is quite identical with the instant case save for ½ of 1% of drop shipments ignored by the Court as inconsequential and not, of course, existing as an element in the case at bar.

The Ranhoff case has an added value to our present controversy. The learned District Court Judge in his excellent opinion with consummate finality distinguishes away *Binderup* vs. *Pathe Exchange, Inc.*, *Grand Union Tea Co.* vs. *Evans*, and other authorities cited in the brief of the Petitioner herein as authorities.

As we go to press the last decision of first instance under The Fair Labor Standards Act is:

> *Kirschbaum* vs. *Walling*, U. S. Supreme Court Law ed. Advance Opinions, Vol. 86, Page 1054.

The Court there extends the Act to some operating and maintenance employees of a loft building whose tenants produce goods principally for interstate commerce.

In the Kirschbaum case there was a "conceded production of goods for commerce by the tenants." In the instant case all interstate commerce had ended before the Petitioner rendered any services to the Respondent.

In the Kirschbaum case the employees did not participate "in the physical process of the making of the goods," but they were found to be engaged in a process or occupation necessary to that production, sec. 3 (j) of Act. The Petitioner in the case at bar was a local shipping clerk and local delivery truckster, who performed his labors after the goods had ended their interstate travels at Respondent's warehouse.

The Kirschbaum case excludes employees with "tenuous" relations to interstate commerce and the production of goods for it. Coverage by the act is found to be a matter of degree. But the Kirschbaum case does not affect employees after the fact of interstate commerce has ended, such as the Petitioner here.

General Tobacco & Grocery Co. vs. *Fleming*, 125 Fed (2nd) 596, C. C. A., 6th Circuit, Feb. 5, 1942.

The Administrator petitioned the District Court for an order requiring the appearance of witnesses and the production of evidence before the Administrator under The Fair Labor Standards Act. The employer responded to the show cause order objecting to the jurisdiction of the court on the ground that the employer was not engaged in interstate commerce. The employer's answer revealed a business identical with that of this Respondent save that the employer in that case bought more than one-half of his merchandise from outside its state. No evidence was taken out.

The Circuit Court reversed the order of the District Court granting the Administrator's petition because the record did not disclose interstate commerce.

Walling, Admr. vs. *Mutual Wholesale Food & Supply Co.*, U. S. Dist. Court, Minnesota, 4th Div., Commerce Clearing House, paragraph 61228.

That case ruled that a wholesaler buying almost all of his

goods from without the state and selling them within the state is not in interstate commerce under this Act, that in view of the wording of the Act the "stream of commerce" argument can not prevail.

Jax Beer Co. vs. *Redfern*, C. C. A., 5th Circuit, Texas, Dec. 10, 1941, Commerce Clearing House, paragraph 60817.

This was a case of a wholesale beer dealer which received all its product from out of state into its warehouse and sold it to intrastate retailers. The wholesaler was adjudged to be outside the Act.

Although, as we have stated supra, administrative bulletins under this Act have no binding effect upon the courts, it is interesting to note that the Wage and Hour Division in a statement of coverage under Section 12 (a) of The Fair Labor Standards Act, Field Instructions, dated June 4, 1942, has said:

"Wholesale establishments and warehouses distributing all of their goods within the State. It is believed doubtful that a shipment or delivery for shipment in commerce takes place within the meaning of section 12 (a) of the Act where a wholesale establishment or warehouse neither ships goods directly across State lines nor delivers goods for shipment across State lines. Deliveries of goods from establishments of this type which employ minors should not be considered a violation of Section 12 (a)." Commerce Clearing House, PP. 33159.

REBUTTAL

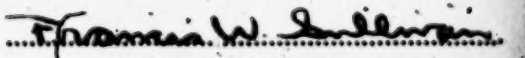
The Transcript of Record in this case consists of opinions by the Superior and Supreme Courts below. Petitioner in his brief has made certain assertions and assumptions. Paragraphs 2, 4 and 5 of Page 4, Petitioner's Brief, are not sustained by the Transcript of Record. In the first sentence of paragraph 1, Page 11, "regularly recurring orders" are as-

serted without foundation in the record. Drop shipments in the last paragraph of Page 13 are gratuitously assumed. In the second sentence of the paragraph marked "Conclusion" on page 35, Petitioner's Brief, the accusation of failure to keep records required by the Act has no foundation in the Transcript of Record.

Respectfully submitted,







Attorneys for Respondent.

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CHARLES ELMORE CROPLEY

In the Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 97 and 336

ANSEL HIGGINS,
Petitioner

v.

CARR BROTHERS COMPANY,
Respondent

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

JACKSONVILLE PAPER COMPANY,
Respondent

ON WRITS OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE AND TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR LEAVE TO FILE BRIEF AND BRIEF, AS AMICUS CURIAE, ON BEHALF OF AMERICAN RETAIL FEDERATION

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In the Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 97 and 336

ANSEL HIGGINS,
Petitioner

v.

CARR BROTHERS COMPANY,
Respondent

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

JACKSONVILLE PAPER COMPANY,
Respondent

ON WRITS OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE AND TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned respectfully petitions this Honorable Court for leave to file a brief as amicus curiae in the above-entitled cases. Counsel for all parties have assented in writing as indicated by letters filed with the clerk of this Court.

This application is made by the undersigned as counsel for American Retail Federation, Washington, D. C., members of which include 13 national and 28 state retail associations. A list of these members is attached hereto as Appendix A. The question involved in each of the cases is of direct interest to the members of the Federation.

Respectfully submitted,

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In the Supreme Court of the United States

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ON WRITS OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE AND TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT

This brief is filed on behalf of the American Retail Federation. Most retailers serve a local community within a single state. A very large proportion of their merchandise comes from other states and very frequently retail stores use warehouses rather than space in the

stores for receipt of that merchandise and its storage before it is delivered to the stores for sale.

There is an apparent similarity between the duties of employees in a warehouse attached to a wholesale business and the duties of employees who work in a warehouse that functions as an integral part of a retail business. The Administrator of the Wage and Hour Division does not distinguish between these two classes of employees and seeks to apply indiscriminately to both, his notion that they occupy an intermediate, not terminal position in interstate commerce. (See Petition for Certiorari in *Walling* v. *Goldblatt Brothers, Inc.*, No. 418 Present Term, pp. 9-11). In our opinion the Administrator is in error. We take the view that the fundamental differences between a wholesale and retail business dwarf the apparent similarities between the duties of employees to the extent that rules determining the status of employees in a wholesaler's warehouse under the Fair Labor Standards Act can not automatically be applied to employees in a retailer's warehouse.

The two cases before the Court present the problem of determining the status of wholesale warehouse employees. Although we conceive that vital differences between wholesaling and retailing do not warrant rules evolved with respect to one being automatically applied to both, the Administrator nevertheless seeks to do so. In the present instance, however, and although the reverse is not true, if the Administrator's theory of coverage under the Fair Labor Standards Act is rejected as to wholesale warehouse employees, *a fortiori* on principle it can not be applied to retail warehouse employees. Accordingly, the issue raised in these cases is of direct interest to many of the retailers of this country.

Apart from their direct interest as retail business men, as citizens, the retailers are identified with a national interest, rooted in the present emergency, in favor of freezing wages rather than increasing the amount of

money in circulation.[a] We do not suggest that this national policy which aims to prevent inflation has anything to do with how the Fair Labor Standards Act should be interpreted. We do suggest that it puts into high relief any unwarranted attempt to expand the coverage of that Act in order to increase the amount of money paid to a particular class of employees.

OPINIONS BELOW

In *Higgins* v. *Carr Brothers Company*, No. 97, the opinion of the Supreme Judicial Court of Maine (R. 5-10) is not officially reported but appears in 25 A. (2d) 214.

In *Walling* v. *Jacksonville Paper Company*, No. 336, the opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 742-746) is reported in 128 F. (2d) 395.

JURISDICTION

In *Higgins* v. *Carr Brothers Company*, No. 97, certiorari was granted June 8, 1942. In *Walling* v. *Jacksonville Paper Company*, No. 336, certiorari was granted October 19, 1942. Jurisdiction is conferred, respectively, under Sections 237(b) and 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether employees in the warehouses of wholesale business enterprises are "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act when the duties of such employees relate to the receipt, storing and distributing, within the state, of merchandise that comes from outside the state.

---

[a] See Executive Order No. 9250 "Providing for the Stabilizing of the National Economy."
7 Fed. Reg. No. 196, 7871.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in appendix "B" *infra* p. 39.

STATEMENT OF THE CASES

Higgins v. *Carr Brothers Company, No. 97*

Carr Brothers Company is a corporation operating a wholesale fruit, grocery and produce business in Portland, Maine. Its merchandise is purchased from local producers and also from dealers in other states. This merchandise is delivered into its warehouse by truck and rail and from there it is sold and delivered to the retail trade.

The petitioner was employed at the Carr Brothers Company warehouse. During the period of time now in dispute (January, 1939, to July, 1940) his duties were concerned with putting up orders, loading trucks and driving a light truck in the course of distributing orders. During that time none of the respondent's merchandise was sold or delivered outside of the State of Maine but Higgins worked more than forty hours a week and did not receive any overtime pay for the hours worked in excess of forty.

The Superior Court of Cumberland County in the State of Maine found the petitioner to be engaged "in commerce" for the ten weeks preceding the period of time now in dispute and made an appropriate award. That court held, however, that Higgins was not covered by the provisions of the Fair Labor Standards Act from January, 1939, to July, 1940. On appeal to the Supreme Judicial Court of Maine that judgment was affirmed.

Walling v. *Jacksonville Paper Company, No. 336*

The Jacksonville Paper Company is engaged in the wholesale distribution of paper and paper products in

the southeastern United States. It operates twelve branch warehouses: ten in Florida, one in Alabama and another in Georgia.

The Company does a large volume of business (R. 699). The merchandise in which it deals comes in large part from other states and foreign countries, arriving by rail, boat and truck. From its principal warehouse and five of the branch warehouses, merchandise is sold and distributed to customers in states other than those in which the warehouses are situated. It is conceded that employees in those warehouses are covered by the provisions of the Fair Labor Standards Act (R. 37, 38, 43, 44). From the seven remaining establishments merchandise is sold and delivered only in the states where the warehouses are located. (It is with reference to the employees in those seven establishments that this case is concerned.)

The usual procedure is to sell merchandise that is owned by the Company and stored in its warehouse (R. 412) and to deliver it to the customer. (R. 440, 303, 375, 460) Occasionally a sale is made of merchandise ordered by the Company but which has not yet arrived. In this event, when the merchandise is delivered to the Company (R. 453, 467, 614, 615) it is checked, and then forwarded, in whole or in part, to the customer. (R. 456) Less often an order is taken from a customer before the goods are purchased by the Company. When this occurs the goods are sometimes delivered directly to the customer without ever stopping to be deposited at the Company's warehouse. (R. 459) The petitioner filed a complaint against the Jacksonville Paper Company, alleging that all the employees in all of the warehouses were "engaged in commerce" within the meaning of the Fair Labor Standards Act (R. 5).

The District Court held that none of the respondent's employees in the said seven branch establishments were subject to the Act (R. 707-711). The Circuit Court of Appeals held the District Court Judge to have been in

error with respect to employees whose duties related to the unloading at destination of merchandise from sources outside the state, and to the purchase of goods to be sent across state lines to the Company. The Circuit Court also found error with respect to employees whose duties related to goods ordered by a customer before they were purchased by the Company.[b]

SUMMARY OF ARGUMENT

The lack of any Congressional intention to apply the Fair Labor Standards Act to employees of a local distributor is revealed by the operative phrases of coverage, the structure of the Act and the legislative objective. These sources combine to show the primary intent of Congress to regulate the wages and hours of employees working on goods in the states where they originate or are processed, of employees who handle the goods while they are arriving to their destination, but not of employees handling the goods after they have come to rest for delivery to the consignee. Such a construction is in line with legislative activity subsequent to the enactment of the statute concerning attempts to exclude the wholesale trades and with the well accepted canon that it is the Court's duty to adopt that of two possible constructions which will save and not destroy.

When merchandise is sent into a state where it is subsequently resold and distributed, the Fair Labor Standards Act does not regulate wages and hours of employees handling that merchandise after it has, as a practical matter, come to rest for the purpose of delivery to the consignee. The merchandise then becomes identified with a local stock in trade and the activities of employees with respect to it are not "in commerce". Whether such activities relate to unloading, receipt, storage, transfer, or distribution, they are essentially local. Analogies to

[b] We take no position in this brief with respect to employees whose duties are concerned with this kind of transaction.

cases decided under statutes that concern great national markets or currents of trade are legally inapposite. This is also true of attempts to apply authorities decided under statutes using broader operative phrases of coverage. The outstanding persuasive precedents for the determination of the scope of the words "in commerce" as used in this Act remain the National Industrial Recovery Act and the case of *Schechter Corp.* v. *United States*, 295 U. S. 495. By those precedents the scope of "in . . . commerce" is authoritatively defined and delimited so to exclude regulation of activities that relate to the handling of merchandise that has come to rest after an interstate journey.

ARGUMENT[1]

I.

The Scope of Sections 6 and 7 of the Fair Labor Standards Act Was Intentionally Restricted by Congress so as Not to Embrace Individuals Employed in Local Distributive Businesses.

Two classes of employees are covered by Sections 6 and 7 of the Fair Labor Standards Act: employees "engaged in commerce" or "engaged . . . in the production of goods for commerce". Even under the greatly expanded definition of "produced",[2] it is clear that there is no "production of goods" by such employees. We are therefore concerned solely with interpreting the former phrase.

The problem is to determine a definite boundary line "under a federal enactment between what it has taken

[1] Emphasis throughout this brief is ours.

[2] Section 1(j): "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

over for administration by the Central Government and what it has left to the States", *Kirschbaum* v. *Walling*, 316 U. S. 517; 62 S. Ct. 1116, 1118. The problem must be solved by measuring the scope that Congress intended to give to the words "engaged in commerce"[3] in Sections 6 and 7 of the Act. (See *United States* v. *American Trucking Association*, 310 U. S. 534, 542 and cases there cited in footnote 16.) We submit that any fair appraisal of the indicia of Congressional intention requires that the boundary line be drawn so as to exclude from coverage under the Fair Labor Standards Act the employees of a business which distributes for consumption or resale within a state, merchandise that comes from outside the state.

A. *The operative statutory words themselves and the structure of the Act demonstrate the Congressional intent not to regulate a local distribution of merchandise that has been received from other states.*

Although we are not here concerned with a determination of the scope of the second phrase of coverage, namely, "engaged . . . in the production of goods for commerce", nevertheless, its larger scope demonstrates the paramount concern of Congress with the regulation of hours and wages of employees handling goods in the states of origin and before those goods start an interstate journey.[4] *Warren-Bradshaw Drilling Co.* v. *Hall*, No. 21 Current Term, decided November 9, 1942. That provision, read in the light of the pertinent definitions

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[3]Section 1(b): " 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

[4]This paramount concern of Congress with conditions surrounding the "production" of goods that eventually travel across a state line is also shown by the prohibition in Section 15(a)(1) against the transportation as *shipment*, *delivery* or *sale* in interstate commerce of "unfair goods" and by Section 12 with respect to goods produced by oppressive child labor.

in Section 3, is stretched to the utmost[5] by sweeping within its coverage employees having any "necessary" connection with goods that eventually travel across a state line in commerce. Broad as it is, we submit that provision does not regulate conditions beyond those existing in the states where "goods" originate or are processed. The comparative position of the two operative phrases of coverage makes it clear that once goods start to move from those states, the task of carrying the benefits of the Act to other individuals falls upon the second operative phrase "in commerce".

These considerations reveal that Congress intended to regulate the wages and hours of work of employees handling goods before they start an interstate journey and while they are on an interstate journey, but not after they have finished their interstate journey. If it had been the intention of Congress to regulate the third as well as the first two stages, it could have easily been done by broadening the operative words of coverage. An examination of statutes enacted during recent years[6] makes

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[5] *United States* v. *Darby*, 312 U. S. 100. In speaking of the *Darby* case Mr. Justice Frankfurter has said "We had there to consider the full scope of the constitutional power of Congress under the Commerce Clause in relation to the subject matter of the Fair Labor Standards Act." *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 344, 355.

[6](a) Section 2(b) of the Packers and Stockyards Act, 42 Stat. 159, 160, U.S.C. Ti. 7, §183: "For the purpose of this Act . . . a transaction in respect of any article shall be considered to be in commerce if such article is part of that current of commerce" (whereby livestock and other goods) "are sent from one State with the expectation that they will end their transit, after purchase, in another, *including* . . . all cases where *purchase* or sale is either *for shipment to another State*, or for slaughter of livestock within the State and shipment outside the State of the products resulting from such slaughter . . ." See *Stafford* v. *Wallace*, 258 U. S. 495; *Tagg Bros. & Morehead* v. *United States*, 280 U. S. 420.

(b) Section 2(b) of the Grain Futures Act, 42 Stat. 998, 999 (now Commodity Exchange Act, 49 Stat. 1491, U.S.C. Ti. 7, §3) has practically the same coverage (including purchase for shipment) as the Packers and Stockyards Act. See *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

(c) Section 10(a) of the National Labor Relations Act, 49 Stat. 449, 450, 453, U.S.C. Ti. 29, §160(a) regulates unfair labor practices "*affecting* commerce", which term is defined in Section 2(7) to mean, in addition to "in commerce", "burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Note was specifically made of the inclusiveness of this phrase in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 31.

it abundantly clear that Congress, when it so intends, knows how to reach activities in the state of destination by apt and inclusive words. "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly." *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351.

A consideration of other statutes[7] that show no intent to exhaust the plentitude of Congressional power and, like

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(d) Section 1(i) of the Tobacco Inspection Act, 49 Stat. 731, U.S.C. Ti. 7, §511i, has practically the same coverage (including purchase for shipment) as the Packers and Stockyards Act. See *Currin* v. *Wallace*, 306 U. S. 1, 10-11.

(e) Section 4A of the National Bituminous Coal Conservation Act, 50 Stat. 72, 83, U.S.C. Ti. 15, §834, expressly includes "transactions in coal in intrastate commerce". See *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 393.

(f) The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246 (reënacting 49 Stat. 750, 753, §8c(1), U.S.C. Ti. 7, §608c (1), extends to "such handling" (of agricultural products) "as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce". See *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533; *United States* v. *Wrightwood Dairy Co.*, 62 Sup. Ct. 523.

(g) Section 301(a)(4) of the Agricultural Adjustment Act of 1938, 52 Stat. 31, 38, U.S.C. Ti. 7, §1301(a)(4) prescribes a scope substantially similar to that of the National Labor Relations Act.

(h) Section 1 of the Federal Employers' Liability Act, 35 Stat. 65, regulated carriers "engaging in commerce" with respect to employees injured while "in such commerce". The Act was broadened by Section 1 of the Act of August 11, 1939, 53 Stat. 1404, U.S.C. Ti. 45, §51, providing "Any employee . . . any part of whose duties . . . shall be the furtherance of . . . commerce, or shall, in any way directly or closely or substantially, affect such commerce . . . shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce . . ." The Senate Report (No. 661, 76th Cong., 1st Sess.) said: "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be at the time of the injury, temporarily divorced therefrom and engaged in intrastate operations."

7(a) *Federal Employers Liability Act.* See *supra*, n. 6(h).

The decisions under this statute are voluminous. Many are conveniently collated in Schoene, L. P. and Watson, F., Workmen's Compensation on Interstate Railways, 47 Harvard Law Review, 389 (1934). These cases have repeatedly held that the Act applied only to employment so closely connected with interstate transportation as to be practically a part thereof. Of particular significance is the tendency of the Federal Employers Liability Act cases to narrow a statute, which, like the Fair Labor Standards Act, uses the phrase "in commerce" and the subsequent necessity for an amendment broadening that coverage by substituting the operative words of the 1939 amend-

this Act, limit the particular regulation involved to matters "in commerce" makes this statement doubly clear.

It cannot properly be argued that because the Act makes provision exempting the retail trades in Section 13(a)(1) and (2) that Congress has indicated its intent to include all other local distributive trades. The use of the maxim "exclusio unius, inclusio alterus" is not thus to be invoked. The reason is patently evident in the legislative history.[8]

B. *The expressed legislative objectives of the Fair Labor Standards Act reveal that Congress did not intend to regulate wages and hours of persons engaged in the local distribution of merchandise.*

The evil sought to be remedied by legislation is, of course, of fundamental importance in determining its meaning. *Holy Trinity Church* v. *United States,* 143 U. S. 457, 463. And the evil at which this statute was directed is made abundantly clear by the President's message, the witnesses before the Congressional committees, the Senate and House Reports, the debates and consideration of the bill in its various forms during the legislative process,

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ment in order to effectuate the Congressional intent to expand the scope of that Act.

(b) *Federal Trade Commission Act,* 17 38 Stat. 717, U.S.C. Ti. 15, §44. See: *Federal Trade Commission* v. *Bunte, Bros., supra.*

(c) *Motor Carrier Act,* 49 Stat. 543, U.S.C. Ti. 49, §301.

(d) *Cf. National Recovery Act,* 48 Stat. 195, U.S.C. Ti. 15, §703. Discussed in this brief, pp. 18, 19, *infra.*

[8]The "retailing capacity" and "retail establishment" exemptions provided in Section 13(a)(1) and (2) were not in the original bill, the language of which, the same as finally adopted, admittedly did not extend to retailers because of receipt of goods from interstate commerce. See *infra* pp. 15-18. The presence of these exemptions may thus not properly be made the basis of any inference with respect to the coverage intended for Sections 6 and 7. These exemptions are fully explained by (1) the interstate commerce which might be involved in the case of local retailers situated near a state line (see Sen. Rep. Vo. 884, p. 5, 75 Cong. 1st Sess.) and (2) an abundance of caution. The "retail establishment" exemption free from delimitation by the Administrator was inserted and adopted in the House on motion from the floor by Representative Celler at the instance of cautious retailers. (83 Cong. Rec. 7438.)

and finally, the Finding and Declaration of Policy in Section 2 of the final enactment. All sources combine to show that the Congressional purpose was to prevent the evils resulting from substandard labor conditions which, through the use of the channels of interstate commerce, spread from some states to others, but not to undertake the more ambitious and constitutionally questionable task of regulating conditions the effect of which was almost exclusively local. Accordingly, Congress undertook to regulate low wages and long hours in the states of origin of the goods and while the goods were on the interstate journey; these were matters beyond the legal and practical control of a single state and required federal legislation in order not only that they be eradicated but that the states be enabled to regulate local conditions which were within their effective control acting separately. It did not propose to regulate evils that might exist in the state of destination of goods from other states or where goods were produced and sold within a single state; in each case not only was federal action unnecessary but state legislation could cope more satisfactorily with the varying local problems involved.

The President, in his message,[9] recommended that only goods "produced" under conditions meeting minimum standards of free labor be "*admitted* to interstate commerce" and he expressed the hope, with respect to those labor conditions with which a State "may effectively deal without fear of unneighborly competition from sister States", that "the proposed Federal legislation should be a stimulus and not a hindrance to State action".

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[9]May 24, 1937. See Sen. Rep. No. 884 (75th Cong., 1st Sess.), p. 1; 81 Cong. Rec. 4960 and 4983.

The bills[10] to which the President referred, with a primary coverage[11] almost identical with that finally adopted, reveal the same purpose of the drafters. As is clear from a memorandum,[12] even to the judicial precedents cited for the various provisions of coverage[13] and the testimony before that Committee, the proposed legislation was "intended to catch the unfair labor practices at the point of production" so that "they must be fair goods if they move across the State line";[14] and it was to include production and transportation industries, but it did not extend to those engaged in "distribution and service".[15]

This purpose thus made clear at the outset is made even more explicit by the Committee Reports[16] and debate

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10 75th Cong., 1st Sess., S. 2475 and H.R. 7200, introduced May 24, 1937 in both Senate and House (Cong. Rec. 4961 and 4998).

11 The basic provisions covered "employees . . . engaged in interstate commerce or . . . in the production of goods which are sold or shipped to a substantial extent in interstate commerce". (See Secs. 2(a)(10)(11) and 4.)

The bill also included various supplementary provisions which allowed administrative action in particular cases of intrastate activities where interstate commerce was discriminated against or put at a competitive disadvantage or otherwise directly affected (Sections 8(a) and 10).

12 See Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H.R. 7200 (75th Cong., 1st Sess.), pp. 54-62.

13 Strikingly enough the precedents cited for regulating employees "engaged in commerce" were *Wilson* v. *New*, 243 U. S. 332; *Virginia Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515; *Washington, Va. & Md. Coach Co.* v. *N.L.R.B.*, 301 U. S. 142 (*Ibid.*, p. 59).

14 *Ibid.*, pp. 39-40.

15 *Ibid.*, p. 159.

16 The Bill, as reported out by the Senate Committee on July 8, 1937 (81 Cong. Rec. 6894) was, like the final Act, limited to employees "engaged in commerce or in the production of goods intended for" commerce (Secs. 4 and 7), with the single exception of the case where goods *produced and sold locally competed* with goods sold or transported in interstate commerce (Sec. 8(a)). The accompanying Report (Sen. Rep. No. 884, 75th Cong., 1st Sess.) states: "The bill carefully excludes from its scope business in the several States that is of a purely local nature. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce" (p. 5).

in both Senate and House.[17] In the words of Senator Thomas explaining the bill finally agreed to in conference[18] and passed without change, "Both Houses obtained their common objective, which was to abolish traffic in interstate commerce . . . in the products of underpaid and overworked labor" (83 Cong. Rec. 9163).

This Congressional purpose received its final expression in the Finding and Declaration of Policy of Section 2. (Quoted *infra* p. 39) The Act is there expressly stated to be directed toward "*industries* engaged *in* commerce or *in the production of goods for* commerce"; and the five evil effects which are set forth indicate the intention to reach producers, shippers and carriers but not those who receive goods from interstate commerce.[19] The restricted purpose here in view is brought into high relief by comparison with the declarations of policy in earlier

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[17]The Chairman of the Senate Committee, introducing consideration of the Bill, pointedly said:

> "the bill is offered with the belief that it is impossible today to expect that any one local community can tend to bring about the proper regulation of the business of producing . . . goods to be scattered throughout the entire forty-eight States"

but that it had been the "prevailing" if not "unanimous" sentiment of the Committee that

> "business of a purely local type which serve a particular local community and which do not send their products into the streams of interstate commerce, can be better regulated by the laws of the communities and of the States in which the business units operate" (81 Cong. Rec. 7648).

During consideration in the House, after the bill had been passed by the Senate (July 31, 1937, 81 Cong. Rec. 7957) and reported out by the House Committee (August 6, 1937, 81 Cong. Rec. 8478) the Chairman of the House Committee, enumerated 23 States with minimum wage laws which had been studied by the Committee and said the bill left "local business" to "the protection of the laws of the several States". (82 Cong. Rec. 1392.)

[18]H. Rep. No. 2738, 75th Cong., 3d Sess. (83 Cong. Rec. 9158, 9246).

[19]In *United States* v. *Darby*, 312 U. S. 100, at 109, Chief Justice Stone said: "Its (the Act's) purposes, as we judicially know from the declaration of policy in s. 2(a) of the Act, and the reports of Congressional Committees proposing the legislation . . . is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several States". See also pp. 115, 122.

drafts of the bill and in the National Labor Relations Act.[20] In the original bill it was declared to be the purpose to eliminate substandard conditions "in and *directly affecting* interstate commerce"; the policy declared in the House bill which went to conference included the elimination of substandard conditions "in occupations in and *affecting* commerce". The National Labor Relations Act makes reference to "affecting . . . the flow of . . . manufactured or processed goods *from* or into the channels of commerce" and to "causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing *from* or into the channels of commerce".

As was made evident at every stage of the legislative process, therefore, the objective of Congress in enacting the present law plainly did not embrace the regulation of the wages and hours of work of employees at the place of destination where the goods are locally distributed. Their working conditions are of concern only to a single state and were appropriately left by Congress to the regulation of that state.

C. *The legislative history of the Fair Labor Standards Act shows the intent of Congress was not to regulate the wages and hours of individuals concerned with local distribution of goods received from other states.*

The legislative history of the Fair Labor Standards Act establishes that the adoption of a restricted coverage by the use of the words "in commerce" was deliberate. This fact has been acknowledged by this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, 62 S. C. 1116, 1120, and there now appears to be no need to discuss in detail the various suggested changes preceding the final selection of the phrase "in commerce". However, the significance of such a deliberate selection is placed in striking relief

[20] 49 Stat. 449, §1, U.S.C. Ti. 29, §151.

when considered against the background of the judicial construction accorded the precise phrase as used in the National Recovery Act.[21] Particularly is this true in the light of the fact that the purpose of the Fair Labor Standards Act is a partial[22] and more modest realization of some of the aims of the N. R. A. which was struck down in *Schechter Corp.* v *United States*, 295 U. S. 495. Frequent reference to that case was made during the course of Congressional consideration of the bill resulting in the present act. And in enacting the present statute it was the stated intention of Congress to conform to its pronouncements.

In the *Schechter* case the defendants were wholesale slaughter house operators in New York. They bought live poultry (96% of which originated outside of New York) from commission men, a majority of whom were located in New York, many of whom were located in New Jersey and some of whom were located in Pennsylvania (295 U. S. at 520, lines 17-18 and 34-36). After the poultry was carried to the defendants markets in New York, it was sold, usually within twenty-four hours, to New York retail poultry dealers and New York butchers who sold to New York consumers. The Court considered whether the code regulation of wages and hours of work of the *Schechter* employees could be sustained under either of the statutory provisions of the N.R.A. One of these was whether the activities regulated by the codes were "in" commerce. With respect to that provision, Chief Justice Hughes said that when "the poultry was trucked to this slaughter house . . . for local disposition . . . the interstate transactions in relation to that poultry then ended . . . Neither the slaughtering nor the sales by defendants were transactions in interstate commerce" (p. 543). "The persons employed in slaughtering and

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21 48 Stat. 195, U.S.C. Ti. 15, §703.

22 The collective bargaining aspects of the N.R.A. were, of course, given permanent form in the National Labor Relations Act.

selling in local trade are not employed in interstate commerce." (p. 548) Mr. Justice Cardozo, with whom Mr. Justice Stone concurred, also pointed out that "There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere." (p. 554)

This was the authoritative and precise construction of the scope of the words "in commerce" that was considered by Congress before deliberately adopting those words in the present Act. In view of the similarity between the N.R.A. and the present statute of subject matter sought to be regulated and the repeated reference to the interpretation of that Act during Congressional consideration of the present legislation, it is clear beyond peradventure of doubt that Congress intended the words "in commerce" to have no broader scope than that which had been thus authoritatively prescribed.

It is true that since the passage of the Fair Labor Standards Act several unsuccessful attempts have been made to add amendments in order to secure exemption for certain wholesale and distributive businesses.[23] However, this fact offers no basis from which to infer the existence of an intent on the part of Congress to include within the scope of the Act as originally passed employees engaged in a *local* wholesale distributive business. All such amendments thus offered, together with one offered before the final passage,[24] sought to do more than to affect a *local* wholesale distribution within a single state. Each had a far greater scope. If enacted, the wholesalers af-

[23]See, for example: 84 Cong. Rec. 5474—Amendment offered by Representative Darrow having the effect of exempting from Section 7 an employee "in an establishment the principal business of which is wholesaling or distributing . . ."; 86 Cong. Rec. 5461, that part of the Borden bill seeking to amend Section 13 by exempting "any employee employed . . . in connection with or incidental to the wholesale distribution of goods by an employer, more than 50% of whose dollar sales . . . consisted of sales to retailers of agricultural food products"; 86 Cong. Rec. 5474, amendment to Section 13 offered by Representative Casey seeking to exempt "any employee employed in a bona fide wholesale establishment".

[24]See 83 Cong. Rec. 7421, an amendment offered by Representative Coffee seeking to exempt certain employees of wholesalers of agricultural commodities.

fected would have been exempt from the provisions of the Act even though their distribution involved interstate shipment of goods. All of the proposed amendments would have denied the benefits of the Act to wholesalers' employees even though the particular employer's business was entirely interstate.

D. *A reiteration of the Congressional intent not to regulate the wages and hours of employees engaged in local distribution of goods received from other states results from the application to the Fair Labor Standards Act of usual aids to statutory construction.*

(1) That Congress did not intend to regulate the wages and hours of employees handling goods at the end of an interstate journey and therefore the words "in commerce" should not be construed so as to include such regulation, appears from the application of a familiar canon of statutory construction. Referring to that canon which makes it the Court's duty to adopt the one of the two possible constructions which will save and not destroy, Chief Justice Hughes has said "We cannot attribute to Congress an intent to defy" the Constitution "or 'even to come so near doing so as to raise a serious question of constitutional law'." *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351-352.

At the time the Fair Labor Standards Act was being considered and enacted *Schechter Corp.* v. *United States, supra*, stood like a beacon squarely holding that (p. 548) "the persons employed in slaughtering and selling in local trade are not employed in interstate commerce" and that (p. 550) an "attempt through the provisions of the code to fix the hours and wages of employees . . . in . . . intrastate business was not a valid exercise of federal power." It is still a beacon. We submit that the cases at bar are with respect to the *Schechter* case, *a fortiori* cases. Wholesale warehousemen here involved like the Schech-

ter Corporation buy goods of extrastate origin for intrastate sales. Some of those goods are sold to retailers sometimes within twenty-four hours. Unlike the poultry business of Schechter, by no means all of these goods are sold to retailers or consumers within a day and the warehousemen do not alter all of the goods by butchering or other processing.

The fact that poultry was slaughtered does not warrant a failure to apply the *Schechter* case to warehouses where no processing is done. The killing of the poultry is of no constitutional significance since slaughtering does not effect a current of commerce which would otherwise exist. *Stafford* v. *Wallace*, 258 U. S. 495, 498. The *Schechter* case cannot be validly distinguished on the ground that wholesale warehousemen are like the commission men in the *Schechter* case and that these commission men were inferentially assumed by the Chief Justice to be in interstate commerce. (Cf. Brief for the petitioner in *Walling* v. *Jacksonville Paper Company*, pp. 35-38) In the first place because much of Schechter's poultry was purchased from commission men in New Jersey or Pennsylvania and then trucked to the Schechter's slaughterhouse in what is clearly an interstate shipment. Secondly, because "commerce among the states is not a technical legal conception but a practical one, drawn from the course of business." (*Swift & Co. v. U. S.*, 196 U. S. 375, 398) and the poultry when sold by commission men was as a *practical* matter only partly through an interstate journey, whereas merchandise delivered to a wholesaler for subsequent intrastate resale and distribution is, as a *practical* matter, a part of the wholesaler's local stock in trade.

Apart from the authority of the *Schechter* case, there are general constitutional considerations which would render a construction of the words "in commerce" in Sections 6 or 7 of the Fair Labor Standards Act so as to include employees of a local wholesaler, at least a constitutionally questionable exercise of the commerce

power and therefore not to have been the construction contemplated by Congress.

Any attempted exercise of the commerce power is subject to the following principle:

> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system". *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 30.

That principle is not applied when employees of wholesale warehouses handling the distribution within a state of, for instance, fruit and produce or paper products are found to be engaged in interstate activities. This kind of local distribution is in no way comparable to the great nation-wide current of livestock,[25] grain,[26] steel,[27] tobacco,[28] milk,[29] and coal.[30] Unless the employees engaged in a local distribution work for wholesalers dealing in a kind of merchandise that is identified with a national market or a nation-wide current of traffic or trade, regulation of the wages and hours of such employees can be regarded as beyond the national commerce power. *Schechter Corp.* v. *United States*, 295 U. S. 495. The local distribution of paper products or fruit and produce can hardly be considered to be so enmeshed with predominantly interstate sales of the same products as to invoke the doctrine of *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, or the principle of the cases referred to in the last three footnotes.

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[25] *Stafford* v. *Wallace*, 258 U. S. 495; *Tagg Bros. & Morehead* v. *U. S.*, 280 U. S. 420.

[26] *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

[27] *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, *supra*.

[28] *Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 533.

[29] *U. S.* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 342.

[30] *Sunshine Anthracite Co.* v. *Adkins*, 310 U. S. 381.

(2) There is here no proper occasion to use a concurrent administrative interpretation of a statute as an aid to its judicial construction. Admittedly an interpretation by the Administrator of the Wage and Hour Division of the meaning to be given to the Fair Labor Standards Act is entitled to "great weight". *United States* v. *American Trucking Association, Inc.*, 310 U. S. 534, 549. In the present situation there has been no real assertion by the Administrator that the Act applies to employees of a wholesaler engaged in the local distribution of goods. This is apparent from an examination of paragraphs 14-16 of Interpretative Bulletin Number Five, issued by the Wage and Hour Division.[31] With the exception of the assertion that the Act applies to employees of a local wholesaler who are concerned with direct interstate ship-

[31] 1942 Wage and Hour Manual, p. 24.

The paragraphs to which reference is made appear as follows:

"14. The status of wholesalers has been a subject of frequent inquiry. Interpretative Bulletin No. 1 states that 'employees who are an essential part of the stream of interstate commerce are included in the phrase "engaged in commerce"; for example, employees of a warehouse whose storage facilities are used in the interstate distribution of goods.' Similarly, employees engaged in making sales at wholesale across State lines or in work incidental thereto are 'engaged in commerce.'

"15. Many wholesalers make all their sales within the State in which their places of business are located, but purchase the goods from outside the State. There are varying situations within this group of wholesalers selling locally. At times, shipment will be made direct to the customer of the wholesaler from the out-of-State manufacturer. Again, shipment may be made to the wholesaler after the goods have already been resold to or ordered by the customer. Employees engaged in connection with such sales are an essential part of the stream of interstate commerce and are included in the phrase 'engaged in commerce'.

"16. Again, there will be employees whose sole work is connected with goods sold from stock at the wholesaler's place of business. It is possible that a court may draw a distinction between employees engaged in connection with the sale of goods in the original package and employees engaged in connection with the sale of goods after the package has been broken. More likely, however, the courts will reject such a distinction and hold that employees employed in connection with the wholesale sale of goods brought in from outside the State are engaged in the stream of commerce and entitled to the benefits of the Act, whether or not the goods are sold in the original package. It is our opinion that wholesalers purchasing their goods from outside the State should comply with the provisions of the Act."

ments to a customer ordered by the wholesaler and the interstate shipment to the wholesaler following a specific prior order by the customer, the bulletin does not contain a positive assertion that the Act covers the employees of a wholesaler engaged in a local distribution. At most there is nothing but the weak statement of a doubtful conclusion appearing in the last sentence of paragraph sixteen prefaced by two statements well within the realm of fancy and conjecture. Moreover, the interpretations of the Wage and Hour Division concerning the application of the Act to local wholesale warehouse employees have not been consistent.[32]

We therefore submit that by every relevant criterion it was the intention of Congress to restrict the scope of Sections 6 and 7 of the Fair Labor Standards Act so as not to include individuals whose duties relate to the distribution of merchandise that takes place within a state and, the language which Congress deliberately chose is precisely fitted to carry out that intention and to deny such a coverage to the Act.

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[32]The following is part of the Wage and Hour Division Field Instructions, June 4, 1942 (¶33,159, C.C.H. Labor Law Service) and concerns coverage of certain industries under Section 12(a) of the Act.

a. Wholesale Establishments and Warehouses

"The determination of coverage of such establishments should be covered by the following principles:

"*Wholesale establishments and warehouses distributing all of their goods within the State.* It is believed doubtful that a shipment or delivery for shipment in commerce takes place within the meaning of section 12(a) of the Act where a wholesale establishment or warehouse neither ships goods directly across State lines nor delivers goods for shipment across State lines. Deliveries of goods from establishments of this type which employ minors should not be considered a violation of section 12(a)."

II.

Merchandise from Out of the State, Consigned to a Wholesaler Distributing within a State, Ceases to be in Interstate Commerce When it Comes to Rest for the Purpose of Being Delivered to the Consignee with the Result That Thereafter the Wages and Hours of Employees Whose Duties Relate to Unloading, Receipt, Storage and Distribution of Such Merchandise Are Not Subject to Regulation by the Fair Labor Standards Act.

The test of coverage under Sections 6 and 7 relates to the nature of the employment of the particular employee. (*Kirschbaum* v. *Walling*, 316 U. S. 517, 62 S. Ct. 1116, 1120, *Warren-Bradshaw Drilling Co.* v. *Hall*, No. 21 Current Term, Decided November 21, 1942.) In every case, therefore, the specific problem becomes one of determining whether a particular employee's activities are such as to include him within the boundary line that marks the division between what has been taken over for administration by the Federal Government and what has been left to the states. (See *Kirschbaum* v. *Walling* and *Warren-Bradshaw Drilling Co.* v. *Hall, supra.*)

As we have indicated in Point I of this brief, the clear intent of Congress was not to apply Sections 6 and 7 of the Act to individuals employed in a local distributive business. The *Schechter* case, which alone involved a regulation like that here presented and which presents a similar factual situation, requires the same conclusion.

It has, moreover, long been familiar law that interstate commerce ends upon the receipt of goods from out of state for the purpose of local storage, sale or other disposition and that any further dealings with such goods are in the field of intrastate commerce. Many decisions under Federal statutes with language like that used

here,"[33] in addition to the *Schechter* case, make this clear. The same is true with respect to other cases that decide, for purposes of taxes or regulations by a state, that goods held for local disposition in the state of destination are no longer in interstate commerce.[34] Thus, it was stated in *Liggett & Co.* v. *Lee*, 288 U. S. 517, at 539,

> "A tax on the value of merchandise in a retail store, or warehoused . . . for sale in that store, even though incident on articles which have moved in interstate commerce is laid after interstate commerce has ceased."

So, too, even where there is an uninterrupted flow of oil from outside the state through seaboard storage tanks to other storage tanks in various parts of the state in which it is subsequently distributed to customers,

> "It seems very clear . . . on a broad view of the facts that the interstate or foreign commerce in all

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[33] See *supra*, p. 12, n. 7.

The Federal Employers' Liability Act, with its restricted scope prior to 1939, it is well settled, applied only to employees so closely connected with interstate transportation as to be practically a part thereof. *E.g.*, *Shanks* v. *Delaware, L. & W. R. R.*, 239 U. S. 556; *N. Y., N. H. & H. R. R.* v. *Bezue*, 284 U. S. 415. It did not apply to a maintenance man responsible for heating a depot, baggage room, rooms used for general railroad purposes, coaches and a turntable. *Chicago & Northwestern Ry.* v. *Bolle*, 284 U. S. 74.

The Federal Trade Commission Act has been held not to apply to local distribution of extrastate goods. For example, "The claim that they are engaged in interstate commerce rests wholly on the fact that the commodities in which they deal are in large part transported into Virginia from other states in which they are procured. But this *transportation* ends when the goods reach their destination and are placed in petitioners' warehouses in Norfolk and Newport News." *Winslow* v. *Federal Trade Commission*, 277 Fed. 206, 209 (C.C.A. 4th) *cert. den.* 258 U. S. 618. See also *Ward Baking Co.* v. *Federal Trade Commission*, 264 Fed. 330 (C.C.A. 2d).

The Motor Carrier Act has consistently been denied application to distribution within a state of goods received from out of state. *E.g.*, *R. L. Surles Contract Carrier Application*, 4 M.C.C. 488 (1938); *William V. Kelly Contract Carrier Application*, 7 M.C.C. 315 (1938).

[34] *E.g.*, *Brown* v. *Houston*, 114 U. S. 622; *Pittsburg & Southern Coal Co.* v. *Bates*, 156 U. S. 577; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *General Oil Co.* v. *Crain*, 209 U. S. 211; *Chicago, M. & St. P. Ry.* v. *Iowa*, 233 U. S. 334, 343-344; *Public Utilities Comm.* v. *Landon*, 249 U. S. 236; *Kansas City Structural Steel Co.* v. *Arkansas*, 269 U. S. 148; *Atlantic Coast Line R. R.* v. *Standard Oil Co.*, 275 U. S. 257, 267-270; *East Ohio Gas Co.* v. *Tax Comm.*, 283 U. S. 465, 471; *Liggett & Co., Inc.* v. *Lee*, 288 U. S. 517, 539, 545; *Lipson* v. *Socony Vacuum Co.*, 87 F.(2d) 265, 267 (C.C.A. 1st).

> this oil *ends on its delivery* . . . into the storage tanks or the storage tank cars at the seaboard, and that from there its distribution to storage tanks, tank cars and bulk stations and drive-in stations, or directly by tank wagons to customers, is all intrastate commerce." *Atlantic Coast Line R.R.* v. *Standard Oil Co.*, 275 U. S. 257, 267.

Thus far, the almost unanimous disposition of courts deciding cases under the Fair Labor Standards Act has been to apply these principles and hence to rule that employees whose duties relate to the local storage and distribution of goods received from other states are engaged in intrastate commerce and therefore not within the scope of Sections 6 and 7. Such cases[35] have involved local wholesale and retail branch warehouses of foreign manufacturers and national chain stores, warehouses of local retailers as well as warehouses of local wholesalers. We submit these cases reach the correct result as to such employees. Against this overwhelming weight of authority there are but two District Court cases[36] that adopt a contrary view. We believe these two cases rest on the evident and basic fallacy of attempting to give to the words "in commerce" a scope far beyond that which Congress intended to give.

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[35] *Jewel Tea Co.* v. *Williams*, 118 F.(2d) 202 (C.C.A. 6th); *Jax Beer Co.* v. *Redfern*, 124 F.(2d) 172 (C.C.A. 5th); *Swift & Co.* v. *Wilkerson*, 124 F.(2d) 176 (C.C.A. 5th); *Walling* v. *Goldblatt Bros.*, 128 F.(2d) 778 (C.C.A. 7th); *Walling* v. *Jacksonville Paper Co.*, 128 F.(2d) 395 (C.C.A. 5th); *Gerdert* v. *Certified Poultry & Egg Co., Inc.*, 38 F. Supp. 964 (S.D. Fla.); *Veasey Drug Co.* v. *Fleming*, 42 F. Supp. 964 (W.D. Okla.); *Rauhoff* v. *Gramling & Co.*, 42 F. Supp. 754 (E.D. Ark.); *Duncan* v. *Montgomery Ward & Co.*, 42 F. Supp. 879 (S.D. Tex.); *Eddings* v. *Southern Dairies*, 42 F. Supp. 664 (E.D. So. Car.); *Jehs* v. *Singer Sewing Machine Co.*, 1 W.H. Cases 814; *5 Labor Cases* 62,255 (N.D. Okla.); *Moses* v. *McKesson & Robbins, Inc.*, 44 F. Supp. 528 (S.D. Tex.); *Fleming* v. *American Stores, Inc.*, 42 F. Supp. 511, 524 (E.D. Pa.); *Rivera* v. *Central Aguirre Sugar Co.*, 1 W.H. Cases, 577, *4 Labor Cases* 61,539 (D. P. Rico); *Walling* v. *Mutual Wholesale & Supply Co.*, 5 W. & H. Rep. 730; *6 Labor Cases*, Par. 61,228 (D.C. Minn.); *Walling* v. *Silver Bros. Inc.*, 5 W. & H. Rep. 533 (D.C. N.H.); *6 Labor Cases*, Par. 61,042; *Brown* v. *Bailey*, 177 Tenn. 147 S.W. (2d) 105; *Higgins* v. *Carr Bros. Co.*, 25 A. (2d) 214 (Maine).

[36] *Gavril* v. *Kraft Cheese Co.*, 42 F. Supp. 702 (N.D. Ill.); *Fleming* v. *Alterman*, 38 F. Supp. 94 (N.D. Ga.).

Authorities decided under other statutes in which Congress has "conveyed its purpose explicitly" (*Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351) to regulate certain local activities have no probative force as to the scope intended for this Act. Thus, decisions[37] under the "affecting commerce" statutes[38] are inapposite.[39] Similarly inappropriate are decisions under the "current of commerce" statutes.[40] Congress intentionally refrained from giving such broad coverage to this Act when it used the words "in commerce". Consequently, decisions like *Stafford* v. *Wallace*, 258 U. S. 495 (Packers & Stockyards Act), *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 (Grain Futures Act) and *Currin* v. *Wallace*, 306 U. S. 1 (Tobacco Inspection Act) are not only distinguishable but plainly "cannot be cited to show what is interstate and what is intrastate commerce". *Atlantic Coast Line R.R.* v. *Standard Oil Co.*, 275 U. S. 257, 273. See also *Schechter Corp.* v. *United States*, 295 U. S. 495, 543.

There is no similarity except in the remotest degree between the funnel of commerce involved in great national markets through which livestock,[41] grains[42] and tobacco[43] move and the local distributive operation through which fruit and produce reach the ultimate retailer in Portland, Maine, or through which paper products reach the ulti-

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[37]See, for instance, *N.L.R.B.* v. *Fainblatt*, 306 U. S. 601 (National Labor Relations Act) and *Mulford* v. *Smith*, 307 U. S. 38 (Agricultural Adjustment Act of 1938). These authorities are relied on in the *Alterman* case (n. 36 *supra*) 38 F. Supp. at 100. It also relies on *Currin* v. *Wallace* under a "current of commerce" statute, 38 F. Supp. at 100.

[38]See *supra* pp. 11, 12, n. 6(c), (d), (f) and (g).

[39]This fact has been recognized in some of the lower court decisions cited in n. 34, *supra* (See, *e.g.*, *Jax Beer Co.* v. *Redfern*, 124 F.(2d) 172 (C.C.A. 5th); *Jewel Tea Co.* v. *Williams*, 118 F.(2d) 202, 206 (C.C.A. 10th); *Gerdert* v. *Certified Poultry & Egg Co., Inc.*, 38 F. Supp. 964, 968-969 (S.D. Fla.); *Veasey Drug Co.* v. *Fleming*, 42 F. Supp. 689, 695 (W.D. Okla.); *Eddings* v. *Southern Dairies*, 42 F. Supp. 664, 667 (E.D. So. Car.).

[40]See *supra* p. 11, n. 6(a) and (b).

[41]*Stafford* v. *Wallace*, *supra*.

[42]*Chicago Board of Trade*, *supra*.

[43]*Mulford* v. *Smith*, *supra*.

mate consumer in those parts of Florida where customers of the Jacksonville Paper Company happen to do business. Whatever "current" or "flow" of goods purchased out of the state that exists in such an operation, stops when those goods come to rest for the purpose of being "delivered" and used in the businesses of such local wholesale distributors.

The rate at which a local wholesale distributor turns over the goods in his stock is not determinative of the existence of interstate commerce. That rate varies among different distributors and among different goods carried by the same distributor, depending on local conditions, the nature of the merchandise, the season, the efficiency of operation, general business conditions and other conditions peculiar to a particular enterprise."[44] The essential fact is that once the goods arrive at their destination, they are a part of the distributor's stock in trade. If that trade is within a state, interstate commerce is then over. Such operations afford no warrant for drawing unrealistic metaphors or analogies with respect to a "current" or "flow" of interstate commerce.

> "The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and become commingled with the mass of property within the State and is there held solely for local disposition and use" (*Schechter Corp.* v. *U. S.*, 295 U. S. 495, 453).

Related to some extent to the rate at which a local wholesale distributor turns over his stock is the ability of that distributor to predict accurately the future demands of his customers. The extent to which this is well done, whether by guess or by meticulous analysis of statistical data, and correlated with appropriate action with reference market conditions affecting the supply of goods, measures the success of the business.

[44]Beckman and Engle, Wholesaling, Principles and Practice (1937), p. 356.

This is of the essence of merchandising. It is apparent without need of elaboration that the fact that a wholesale distributor successfully anticipates the needs of his local customers, particularly or generally, and then secures a stock of goods to meet their needs, has no relation whatsoever to whether employees handling those goods are in interstate commerce after the goods are "delivered" to the wholesaler.[45]

There is no similarity between the factually and legally inapposite situations existing in anti-trust cases, such as *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291[46] and *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n.*, 273 U. S. 52,[47] (*Cf.* Brief for the petitioner in *Walling* v. *Jacksonville Paper Company*, pp. 30-35) Moreover, such decisions are not pertinent to what is in interstate commerce since conspiracies to restrain inter-

[45]The brief for the petitioner in *Walling* v. *Jacksonville Paper Company* (p. 28) concedes that an unanticipated local sale from stock would not place employees handling the merchandise "in commerce".

Apparently, however, such employees would *get* into interstate commerce, not by changing their work in any respect, but simply and solely by having the customer continue to order until the time arrives when the employer could reasonably anticipate the re-order. Presumptively, when that time arrived in any given case would be a nice question of fact for the jury.

The absurdity of the view taken in the Government's brief (pp. 25-29) becomes apparent when it is realized that a wholesaler who buys a stock of goods and goes into a local distributive business is not, according to the admission (p. 28), engaged in interstate commerce. Yet under the theory advanced by the Government such a wholesaler becomes engaged in interstate commerce as soon as a *regular* clientele is established.

[46]The *Binderup* case involved a combination by New York distributors of motion picture films and their Omaha agents. Pursuant to prior contracts between a Nebraska exhibitor and the New York distributors, films were sent to the Omaha agents "not as a consummation of the transit but for delivery to the" exhibitor. (*Industrial Assn.* v. *United States*, 268 U. S. 64, 79. Such agents are like the commission men in the *Schechter* case and unlike a local wholesaler distributor.

[47]The *Pacific States* case involved combinations of wholesalers fixing prices they would charge local retailers for goods. The course of business was that pursuant to orders received from manufacturers in other states who either delivered direct to the local retailers or to the wholesalers for the retailers. Accordingly, contrary to the case of a local wholesale distributor, the wholesalers in that case were holding goods subject to the disposition previously made by the agreements. Furthermore the nature and purpose of the handling by such wholesalers, like the agents in the *Binderup* case, differ entirely from the nature and purpose of a wholesaler's local handling for local distribution for subsequent resale or consumption.

state commerce are "none the less within the reach of the Anti-Trust Act, because the conspirators seek to restrain their end by means of intrastate activities". *Schechter Corp.* v. *U. S., supra at* 544. See also *United States* v. *Darby*, 312 U. S. 100, 122; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 62 S. Ct. 523, 526.

We submit that employees of a local wholesale business whose activities are concerned with the storage and distribution of goods received from other states are clearly engaged in intrastate commerce and that the almost unanimous body of decisions[48] that now exists and holds such employees not to be within the scope of Sections 6 and 7 expresses the correct view. We feel that the result of those decisions is within the principles which should control the placing of the boundary line between what has been "taken over for administration by the central government" under the Fair Labor Standards Act and what that Act "as left to the states" (See *Kirschbaum* v. *Walling*, 316 U. S. 517, 62 S. Ct. 1116, 1118).

There is, however, no such unanimity[49] among decisions rendered up to this time with respect to whether the principles we have discussed also require that employees whose duties in a local distributive business relate to the unloading or receipt of goods from other states, be excluded from the provisions of Sections 6 and 7. Most of the cases have drawn the boundary line between coverage and non-coverage along the edge of the unloading platform at the distributor's warehouse.[50] Two cases go further and take the view that all employees who perform any work "in connection with incoming goods" as "ap-

[48] See cases cited *supra* p. 27, n. 35.

[49] See, for instance, cases involving employees unloading goods at freight terminals: *Gerdert* v. *Certified Poultry & Egg Co., Inc.*, 38 F. Supp. 964 (S.D. Fla.); *Veazey Drug Co.* v. *Fleming*, 42 F. Supp. 689 (W.D. Okla.); *Rauhoff* v. *Gremling & Co.*, 42 F. Supp. 754 (E.D. Ark.); *compare: Super-Cold Southwest Co.* v. *McBride*, 124 F.(2d) 90 (C.C.A. 5th); *Klois* v. *Ippolito*, 40 F. Supp. 187 (W.D. Tenn.).

[50] *E.g., Walling* v. *Goldblatt Bros.*, 128 F.(2d) 778 (C.C.A. 7th); *Jax Beer Co.* v. *Redfern*, 124 F.(2d) 172 (C.C.A. 5th). See also cases cited *supra* p. 27, n. 35. Compare the cases cited in n. 36.

propriate or necessary to the furtherance of" purchase and receipt of such goods are covered.[51]

We submit the correct view to be that the facts of the particular situation relative to when and where, as a practical matter, goods come to rest and consequently are "delivered" to a consignee for resale or distribution within the state of destination determine whether employees whose duties relate to the receipt and unloading of those goods are covered by the Act rather than the mechanical determination that results from drawing a line between coverage and non-coverage at a local distributor's unloading platform. We believe this to be the proper application to the present problem of the statement of Mr. Justice Holmes that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business". *Swift & Co.* v. *United States*, 196 U. S. 395, 398. To be sure, under the view which we urge, in some instances (as for example where several packages are brought to the platform by an express truck) an unloading platform will prove to be the place where goods from other states come to rest

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[51] *Fleming* v. *American Stores Co.*, 42 F. Supp. 511 (E.D. Pa.); *Drake* v. *Hirsch*, 40 F. Supp. 290, 294 (N.D. Ga.).

Even if cases drawing the line at the unloading platform are assumed to be correct, these two cases cannot be supported. The question is not whether the employee in question performs duties "necessary to" or "in connection with" carrying on interstate commerce, but whether they are "in" such commerce. Employees who perform various clerical functions, such as checking or inventorying, in connection with incoming goods are no more engaged "in" interstate commerce than the employee in *Chicago & Northwestern Ry.* v. *Bolle*, 284 U. S. 74, who heated the depot, baggage room, a room used for general railroad purposes, coaches and a turntable. And, even on the broadest view of "interstate commerce", the duties of employees who handle or otherwise deal with the goods after they have been unloaded onto the warehouse platform arise only *after* the interstate journey has ended. Congress has shown it knows how to provide for the result which these two cases have legislated when it wants to, not only in the 1939 amendment to the Federal Employers' Liability Act (see *supra*, p. 12, n. 6(h)), but in this very Act itself by expressly providing that the "*production of goods for commerce*" shall include any process or occupation "necessary" thereto (see *supra*, p. 9, n. 2). These cases rest on the evident misapprehension that that provision is by some process of analogy to be transposed to the coverage of employees engaging "in commerce". See *Drake* v. *Hirsch*, 40 F. Supp. 290, at 294, using similar language and citing the *Darby* case, 312 U. S. 100. The view taken by them is untenable for the very reason that Congress gave such a definition in the case of employees engaged in *production*, but not otherwise.

and consequently are "delivered" to the consignee but this would not warrant the application of that result to other situations arising on different facts. (An example of the latter situation would be where a load of merchandise is hauled into the state by a tractor-trailer unit and where, instead of backing up to the consignee's platform and unloading, the tractor is uncoupled and driven away, leaving the loaded trailer on the consignee's premises but some distance away from the platform. Under such circumstances it is not our belief that employees of the consignee should be considered to be "in commerce" simply because they unload the merchandise from the trailer and carry it to the loading platform.)

The *Schechter* case is directly in point. When the poultry "was trucked to their slaughter house in Brooklyn for local distribution", whether from New York, New Jersey or Pennsylvania "the interstate transactions in relation to that poultry then ended" (295 U. S. at 543). Since the interstate movement of goods ends on delivery to the consignee, a local wholesale distributor's employees unloading the goods after delivery are not within the scope of Sections 6 and 7 of the Act. Moreover, this result is expected when the operative words of coverage in those sections are explained by the legislative history and given a construction consonant with the "aim and purpose" of the statute. Those operative words, it must be remembered, are not in a statute that seeks to regulate interstate transactions as to price, trade practices or transportation, but in a statute that seeks the regulation of wages and hours of employees. And it cannot properly be held, we believe, that Congress intended the regulation of such a local matter as the wages and hours of employees whose only connection with the actual interstate commerce was unloading merchandise which had come from another

state.[32] The courts that have held these employees covered by this Act have done so for the reason that in considering *who* was covered, they have failed to consider whether, in view of *what* was being regulated, Congress intended to apply the Act to the particular individual involved.

Cases such as *Baltimore & O. S. W. R. R.* v. *Burtch*, 263 U. S. 250, 544; *Puget Sound Stevedoring Co.* v. *State Tax Comm.*, 302 U. S. 90, 92[33] are not in point since the unloading in each case was by or for the carrier before delivery to the consignee. Nor are other cases that involve statutes expressly covering services (performed by others than the consignee) which admittedly were outside "transportation" but recognized that the determinative fact is not unloading but delivery to the consignee. See *Union Stock Yards & Transit Co.* v. *United States*, 308 U. S. 213, 218-221; *Erie R. R.* v. *Shuart*, 250 U. S. 465, 467, 468; *Southern Railroad* v. *Prescott*, 240 U. S. 637-639; *Cleveland St. L. Ry.* v. *Dettlebock*, 239 U. S. 588, 593-594. (Cf. Brief for petitioner in *Higgins* v. *Carr Brothers Co.*, pp. 22, 23)

To sweep indiscriminately all employees of a local distributor whose duties relate to unloading and receipt of goods from other states within the coverage of this Act is failing to recognize the essential principle that determination of the scope of this Act presents a unique problem and that its words "derive vitality from the aim and nature of the specific legislation" involved. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351. We reiterate the operative words of this Act are "in commerce", not "in the current of commerce", "affecting commerce", or some other similar phrases of

[32] By the same token, it was not, we submit, the intention of Congress to regulate the wages and hours of an individual who is connected with ordering such merchandise since such an employee's only connection with interstate commerce is before the merchandise starts to come from another state. *Cf. Walling* v. *Goldblatt*, 128 F.(2d) 778 (C.C.A. 7th); *Eddings* v. *Southern Dairies*, 49 F. Supp. 664 (E.D. Car.).

[33] See Brief for petitioner in *Higgins* v. *Carr Brothers*, pp. 21, 22, 23.

broader scope. The legislation regulates wages and hours of employees, not transactions in a national commodity market, or combinations in restraint of trade, or trade practices, or prices at which goods may be bought or sold. There are only two earlier instances, apart from transportation industries, of earlier Federal statutes which involve regulation under the commerce clause of relations between employer and employee. One is the National Recovery Act and the other the Labor Relations Act, which, like the present statute, stems from the former enactment. The scope of the latter serves as no precedent in determining the activities of what employees are "in commerce" because that statute was expressly given a scope ("affecting commerce") which was deliberately denied to the Fair Labor Standards Act.

The National Recovery Act, with the *Schechter* decision, delimiting the scope of "in commerce" as used in it, remain as the outstanding persuasive precedents for the determination of the questions to be decided here. If to those precedents be added the fact that the pronouncements in the *Schechter* case as to the scope of the phrase "in" comme... was consciously adopted by Congress as a pattern in enacting the present coverage, together with the implication carried by the legislative history relative to the scope intended for the words "in commerce", it becomes plain that employees of a local wholesale distributor are not within Sections 6 and 7 of the Fair Labor Standards Act when the duties of such employees relate to goods from other states which have, as a practical matter, come to rest for the purpose of being "delivered" to their employer and thus become a part of a local stock in trade.

III.

CONCLUSIONS

The judgment of the Supreme Judicial Court of Maine in the case of *Ansel Higgins* v. *Carr Brothers Company*, No. 97, should be affirmed.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Walling* v. *Jacksonville Paper Company*, No. 336, should be reversed insofar as it seeks to apply the Act to employees whose duties relate to the ordering of goods to be later shipped and to the unloading of goods that have as a practical matter come to rest and been "delivered"; in other respects that judgment should be affirmed.

Respectfully submitted,

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November, 1942.

APPENDIX A

American Retail Federation

MEMBER ASSOCIATIONS

Thirteen National Associations

American National Retail *Jewelers* Association
Cooperative *Food* Distributors of America
Mail Order Association of America
National Association of Chain *Drug* Stores
National Association of *Food* Chains
National Association of Retail *Grocers*
National *Automobile* Dealers Association
National Retail *Dry Goods* Association
National Retail *Farm Equipment* Association
National Retail *Furniture* Association
National Retail *Hardware* Association
National *Shoe* Retailers Association
National *Voluntary Groups* Institute

Twenty-Eight State Associations

California Retailers Association
Colorado Retailers Association
Delaware Retailers' Council
Florida Merchants Association, Inc.
Georgia Mercantile Association
Illinois Federation of Retail Associations
Associated Retailers of *Indiana*
Associated Retailers of *Iowa*, Inc.
Kentucky Merchants Association
State Merchants Association, Inc. (*Maine*)
Maryland Council of Retail Merchants

Massachusetts Council of Retail Merchants
Michigan Retail Institute
Missouri Retailers Association
Nevada Retail Merchants Association
New Hampshire Council of Retail Merchants
Retail Merchants Association of *New Jersey*
New York State Council of Retail Merchants
North Carolina Merchants Association
Ohio State Council of Retail Merchants
Oklahoma Retail Merchants Association
Pennsylvania Retailers' Association
Rhode Island Retail Association
Retail Merchants Association of *Tennessee*
Retail Merchants Association of *Texas*
Utah State Retailers' Association
Vermont Council of Retail Merchants
Retail Merchants Association of *Virginia*

APPENDIX B

Fair Labor Standards Act. c. 676, 52 Stat. 1060 (29 U.S.C., Sec. 201, et seq.).

Section 2 (a). The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

SECTION 3. As used in this Act— . . .

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufactur-

ing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Section 6 (a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates . . .

Section 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce . . .

Section 13 (a). The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; . . .

SUPREME COURT OF THE UNITED STATES.

No. 97.—October Term, 1942.

Ansel Higgins, Petitioner, vs. Carr Brothers Company.	On Writ of Certiorari to the Supreme Judicial Court of the State of Maine.

[January 18, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

This is a companion case to *Walling* v. *Jacksonville Paper Co.*, decided today, and is here on certiorari to the Supreme Judicial Court of Maine. Higgins claims minimum wages and overtime compensation alleged to be due him under §§ 6(a) and 7(a) of the Fair Labor Standards Act between January 1939 and July 1940. Prior to that time respondent, which conducts a wholesale fruit, grocery and produce business in Portland, Maine, had been selling and delivering its merchandise not only to the local trade in Maine but also to retailers in New Hampshire. For the period here in question the New Hampshire trade had been discontinued and all sales and deliveries were solely to retailers in Maine. The only additional facts which we know about respondent's course of business are accurately summarized in the following excerpt from the opinion of the Supreme Judicial Court: "It buys its merchandise from local producers and from dealers in other states, has it delivered by truck and rail, unloaded into its store and warehouse and from there sells and distributes it to the retail trade. While some of the produce and fruit is processed, much of it is sold in the condition in which it is received. The corporation owns all of its merchandise and makes its own deliveries. It makes no sales on commission nor on order with shipments direct from the dealer or producer to the retail purchaser." Higgins' employment involved work as night shipper putting up orders and loading trucks for delivery to retail dealers in Maine or driving a truck distributing merchandise to the local trade.

Petitioner in his brief describes the business in somewhat greater detail and seeks to show an actual or practical continuity of movement of merchandise from without the state to respondent's regular

customers within the state. But here, unlike *Walling* v. *Jacksonville Paper Co.*, there is nothing in the record before us to support those statements nor to impeach the accuracy of the conclusion of the Supreme Judicial Court of Maine that, when the merchandise coming from without the state was unloaded at respondent's place of business its "interstate movement had ended." Some effort is made to show that the court below applied an incorrect rule of law in the sense that it gave the Act too narrow a construction. In that connection it is argued that respondent is in competition with wholesalers doing an interstate business and that it can by underselling affect those businesses and their interstate activities. As we indicated in *Walling* v. *Jacksonville Paper Co.*, that argument would be relevant if this Act had followed the pattern of other federal legislation such as the National Labor Relations Act (see 29 U. S. C. § 152(7), § 160(a)) and extended federal control to business "affecting commerce". But as we pointed out in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, this Act did not go so far but was more narrowly confined.

Thus petitioner has not maintained the burden of showing error in the judgment which he asks us to set aside.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.